UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

DYNAMIC ENERGY INC., and
M&P SERVICES, INC., A SINGLE EMPLOYER,

and **Case 9–CA–45772**

UNITED MINE WORKERS OF AMERICA, AFL–CIO

JUSTICE HIGHWALL MINING, INC.,

and **Case 9–CA–46095**

DYNAMIC ENERGY, INC.,

and **Case 9–CA–46096**

UNITED MINE WORKERS OF AMERICA, AFL–CIO

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DECISION and
RECOMMENDED ORDER

David I. Goldman
Administrative Law Judge

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DECISION

Introduction

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. These cases involve a unionized surface mining employer, Dynamic Energy, that operates (and admits control of) two smaller employers, Justice Highwall Mining and M&P Services, that provide mechanical maintenance and other ancillary support to the unionized mining operation.

In the spring of 2010, M&P Services and Justice Highwall were the subject of union campaigns. At M&P Services, the government contends that the sudden termination of six of eight potential bargaining unit employees was unlawfully motivated—a response to the employer learning, the day before, that the union campaign was coming to fruition and that the union was preparing to openly seek recognition.

At Justice Highwall, the union campaign resulted in the certification of a union as the employees' bargaining representative. After the union's certification, the government contends that employer agents made threats or other unlawful statements to certain Justice Highwall employees in three incidents alleged to have occurred in May, October, and November 2010. In addition, the government alleges that beginning in May or June 2010, the employer unlawfully rescinded scheduled vacations for certain Justice Highwall employees and unlawfully changed the vacation scheduling procedure.

Finally, the government contends that an unlawful threat was made to a Dynamic employee during a grievance meeting, and to another Dynamic employee in September 2010. The government further contends that as of June 27, 2010, work that was within the province of the Dynamic unit employees was unlawfully assigned to nonbargaining unit employees.

STATEMENT OF THE CASE

On June 23, 2010, the United Mine Workers of America, AFL–CIO (Union) filed an unfair labor practice charge against Dynamic Energy, Inc. (Dynamic) and M&P Services, Inc. (M&P) docketed by Region 9 of the National Labor Relations Board (Board) as Case 9–CA–45772.

On January 12, 2011, based on an investigation into the charge filed by the Union, the Regional Director for Region 9, acting on behalf of the Board's General Counsel, issued a complaint and notice of hearing against Dynamic and M&P alleging violations of the National Labor Relations Act (Act). The complaint alleged that Dynamic and M&P constituted a single employer under the Act, and that they unlawfully discharged six M&P employees on or about March 12, 2010, in violation of Section 8(a)(1) and (3) of the Act. The complaint further alleged that a majority of an appropriate bargaining unit of employees had designated and selected the Union as the unit's collective-bargaining representative, and that in view of the discharge of the employees, employee sentiment on collective-bargaining representation would best be protected by issuance of a bargaining order.

On November 8, 2010, the Union filed another unfair labor practice charge against Dynamic, docketed by the Region as Case 9–CA–46096, and an unfair labor practice against Justice Highwall Mining Inc. (Justice Highwall), docketed by the Region as Case 9–CA–46095.

On February 2, 2011, based on an investigation into the charges the Regional Director for Region 9, acting on behalf of the Board's General Counsel, issued an order consolidating Cases 9–CA–46095 and 9–CA–46096, and issued a consolidated complaint alleging violations of the Act. The consolidated complaint alleged that Dynamic and Justice Highwall constituted a single employer under the Act, and that they engaged in various interrogations, solicitations, threats, and promises in violation of Section 8(a)(1) of the Act, and that Justice Highwall changed its vacation scheduling process without affording the Union an opportunity to bargain with respect to this conduct or its effects, in violation of Section 8(a)(1) and (5) of the Act. In addition, it is alleged that Justice Highwall discriminatorily made the changes to its vacation policy and rescinded previously granted vacations in violation of Section 8(a)(1) and (3) of the Act.

Further, the consolidated complaint alleged that Dynamic assigned bargaining unit work to individuals not employed in the Dynamic bargaining unit, and eliminated a coal loader position from the bargaining unit, without providing the Union with notice or an opportunity to bargain, in violation of Section 8(a)(1) and (5) of the Act.

By order issued February 2, 2011, the Regional Director for Region 9 issued an order consolidating Cases 9–CA–45772, 9–CA–46096 and 9–CA–46095 for hearing.

A trial in these matters was conducted February 22–25, and March 9–10, 2011, in Beaver, West Virginia.[1]

Counsel for the General Counsel, the Respondents, and the Union, filed briefs in support of their positions by April 27, 2011. Pursuant to an order issued May 11, 2011, the parties filed further briefs on May 31, 2011, regarding the Union's requested remedy. Still further briefs were filed, July 28, 2011, in response to an order to show cause why a portion of the case should not be deferred. On the entire record, I make the following findings, conclusions of law, and recommendations.

JURISDICTION

The complaints allege, the Respondents admit, and I find that at all material times the Respondent Dynamic has been a corporation with an office and place of business in Beckley, West Virginia, and has been engaged in the operation of a surface mine located at Coal Mountain, West Virginia. The complaints further allege, the Respondents admit, the record shows, and I find that at all material times the Respondent M&P has been engaged in providing labor services at the mine site at Coal Mountain, West Virginia, operated by Dynamic, and that the Respondent Justice Highwall has been engaged in highwall mining operations and contract labor services at the Dynamic operated mine at Coal Mountain, West Virginia. The complaint alleges, the Respondents admitted at the hearing, and orally amended their answer to admit, that Dynamic and M&P constitute a single employer within the meaning of the Act, and that Dynamic and Justice Highwall constitute a single employer within the meaning of the Act. The

[1]At the trial, counsel for the General Counsel moved to amend the complaint, consistent with prior notice provided to the parties (see GC Exh. 2) in Cases 9–CA–46096, 9–CA–46095 to restate and add to par. 6(e) of the complaint, which was an allegation of an unlawful threat to an employee. The motion was granted at trial and the Respondents orally amended their answer to deny the amended par. 6(e). In addition, the General Counsel moved to amend the complaint in Cases 9–CA–46096, 9–CA–46095 to delete par. 13(b), the allegation that Dynamic unlawfully eliminated a coal loader position from the bargaining unit. This amendment was also granted.

complaints allege, the Respondents admit, and I find, that during the past 12 months Respondents, in conducting their operations purchased and received at the Coal Mountain mine site, goods valued in excess of $50,000 directly from points outside the State of West Virginia. The complaints further allege, the Respondents admit, and I find, that at all material times the Respondents Dynamic, M&P, and Justice Highwall, have been employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and the Union has been a labor organization within the meaning of Section 2(5) of the Act.

Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.[2]

UNFAIR LABOR PRACTICES

Background

The Respondent Dynamic's stock is owned by, and it is part of a conglomerate of mining and mining related companies known as Mechel Bluestone, the parent company of which is Mechel OAO. Mechel Bluestone was formed in 2009 when Bluestone Industries was sold to Mechel.

Dynamic operates a surface mine at Coal Mountain, West Virginia. Billy Bob Marcum was hired in late January 2010 to replace the departing General Manager of the mining operations, Bob Cochran. Sometime in the spring of 2010, Cochran left and Marcum formally took over as General Manager.

As of February 2010, Dynamic employed approximately 80 union-represented employees. The Dynamic bargaining unit is composed of the employees performing the work set forth in article 1A (Scope and Coverage), a. (Work Jurisdiction) of the 2007 National Bituminous Coal Wage (NBCW) Agreement, to which Dynamic is a signatory employer.[3] In addition, a memorandum of understanding between Dynamic and the Union provides for certain exceptions to the application of the NBCW Agreement to Dynamic's terms and conditions of employment.

The CEO of Mechel Bluestone, Thomas Lusk, who worked for Bluestone for many years before the sale to Mechel, testified that when Dynamic first recognized the Union in 2004, the intent was to "focus the Dynamic Energy group on the core business of producing coal. . . . And

[2]In light of the stipulation to single-employer status, throughout this decision references to the Respondents will usually be denoted in the singular (*i.e.*, "the Respondent").

[3]The Agreement describes the work jurisdiction as follows:

> The production of coal, including removal of overburden and coal waste, preparation, processing and cleaning of coal and transportation of coal (except by waterway or rail not owned by Employer), repair and maintenance work normally performed at the mine site or at a central shop of the Employer and maintenance of gob piles and mine roads, and work of the type customarily related to all of the above shall be performed by classified Employees of the Employer covered by and in accordance with the terms of this Agreement. Contracting, contracting leasing and subleasing, and construction work, as defined herein, will be conducted in accordance with the provisions of this Article.

all of the support and ancillary services would be contracted out either [to] independent [companies] or [to] wholly owned subsidiaries."

The Respondent Justice Highwall was a subsidiary of the Justice family (Bluestone) enterprises, established in the years prior to Dynamic's recognition of the Union, to provide highwall mining services to the various Bluestone mining operations on an as needed basis.

The parties stipulated at the hearing that for the purposes of this proceeding Justice Highwall and Dynamic are a single employer under the Act.

At Dynamic, the primary use of Justice Highwall was to provide equipment maintenance for the surface operation. In addition, three employees performed more general support services, some of which resulted in a union grievance, discussed below. In total there were approximately 20 Justice Highwall employees working at Coal Mountain.

On March 12, 2010, the Union filed a petition with Region 9 seeking certification as the collective-bargaining representative of the Justice Highwall mechanics and equipment operators working at Coal Mountain. On May 3, 2010, after an April 23 representation election, the Union was certified as the exclusive collective-bargaining representative of a bargaining unit of Justice Highwall employees.[4] As of the date of the hearing in this matter, the parties had met to collectively bargain but had yet to enter into a collective-bargaining agreement.

The Respondent M&P was another Justice family company formed to provide unskilled maintenance and production support for the surface mine operations.

The parties stipulated at the hearing that for the purposes of this proceeding M&P and Dynamic are a single employer under the Act.

M&P provided services to a number of Mechel Bluestone mines. In the spring of 2010, M&P provided a range of services at Coal Mountain. Its employees operated various mobile equipment, worked at ditch cleaning, general labor, crusher maintenance, and in addition, employed five of the security guards for the site. A number of employees testified that in past years they had understood that employment at M&P was a conduit or "training avenue," where employees first worked before being hired at the unionized Dynamic facility. Tom Lusk, the CEO of Mechel Bluestone, disavowed that employment with M&P served as any formal or sure segue to Dynamic, but explained that "M&P was a way that we used and continue to use to develop unskilled, non-skilled employees . . . who could then meet the requirements of stepping into and performing a job that was vacant, for example, at Dynamic Energy."

Prior to March 1, 2010, there were nine nonguard M&P employees working at Coal Mountain. On or about March 1, 2010, one of these was hired by Dynamic and became a member of that bargaining unit.

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[4]The certification recognized the Union as the exclusive collective-bargaining representative of the following unit:

> All mechanics, mechanics helpers, welders, and equipment operators employed at the Employer's Dynamic Energy Coal Mountain W.V. Complex, but excluding all office clerical, guards, managerial employees and supervisors as defined in the Act.

In February 2010, the Union began to seek and obtain authorization cards from M&P employees. Union Organizer Lee Cogar obtained the addresses and phone numbers of the M&P employees, in the majority of cases from Adam Underwood, a unionized Dynamic employee who served in an unspecified union representative position. In uncontradicted testimony, corroborated in all essential respects by the employees, Union Organizers Lee Cogar and Robert Wade testified to the process by which they obtained union authorization cards from each of the nonguard M&P employees working at Coal Mountain between mid-February and March 9, 2010.

On the morning of March 12, 2010, six of the eight nonguard employees were told there would be no work for them until further notice. The six were Stephen Paynter, Nathan Brown, Phillip Coleman, Jeremy Blankenship, Shawn Sheppard, and Christopher Champagne.

On March 15, 2010, the Union filed a petition with Region 9 of the Board seeking certification as the collective-bargaining representative of "[a]ll equipment operators and scalehouse employees employed at M&P Services, Inc. at Dynamic Energy's Coal Mountain, WV operation." The appropriateness of this unit was stipulated to by the parties in a Stipulated Election Agreement executed March 25, 2010.[5] The election was held April 23, 2010. Three of the terminated employees voted subject to challenge. The challenges were determinative as the voting eligibility list contained only two employees who were not terminated March 12. As of the hearing in this matter, there has been no resolution of the challenged ballots. Presumably, resolution of the ballot challenges awaits resolution of the dispute in this case.

I. *The M&P Complaint*
Case 9–CA–45772

A. The termination of the M&P employees

As referenced above, union organizers collected signed and dated authorization cards from the M&P employees beginning in February. By March 9, each of the nine nonguard M&P employee had signed a card.[6]

In early February, prior to signing his union authorization card, M&P employee Steve Paynter observed Union Representative Underwood talking to Tracy Steele, an engineer whom the M&P employees identified as a "boss" (Paynter, Coleman, Champagne) ("he told us what to do"); their "supervisor" (Brown, Paynter, Sheppard, Blankenship); "our foreman, I guess"

[5]The stipulated unit varied ever so slightly, from the petition. The stipulated unit was:

> All equipment operators and scalehouse employees employed at the Employer's Coal Mountain W.V. location but excluding all office clericals, guards, managerial employees and supervisors as defined by the Act.

[6]The cards were typical preprinted union authorization cards, with blanks to fill in the employee's name, address, and spaces to the employee to sign, date, provide address, phone, and other information. The card is headed "AUTHORIZATION FOR REPRESENTATION," and states:

> I, the undersigned employee of [employer name and address] authorize the UNITED MINE WORKERS OF AMERICA to represent me as exclusive collective-bargaining agent in all matters pertaining to wages, hours, term and conditions of employment. This authorization cancels any similar authority previously given to any other person or organization.

(Brown); "reclamation foreman" (Blankenship); the individual they "reported to" (Coleman, Paynter).

After the conversation, sitting in his car, Steele told Paynter that Underwood had been talking to him "about getting our [the M&P employees'] names and phone numbers." Paynter asked Steele "what [Underwood] was wanting our names and phone numbers for." Paynter testified that he did not "recall how [Steele] put it, but it was like to start our own Union." (In his pretrial affidavit, Paynter stated that Steele told him that Underwood was "trying to help us.")

A second later conversation between Paynter and Steele, on March 11, 2010, is also relevant. Paynter testified that in late February or early March he spoke with Union Organizer Cogar who told him that based on the cards "we would be recognized or I guess have to go to . . . I guess take it to vote." Cogar gave Paynter a specific date that would take place. Paynter was unsure in his testimony but believed the date Cogar had spoken of was March 11.

On March 11 Paynter was at work when Tracy Steele showed up to check on Paynter and make sure the work was going ok. The two began talking. As Paynter described it at the hearing, "I let the cat out of the bag, I guess you could say." He told Steele that "Today was the big day" (or alternatively, "Today was the day.") Steele asked Paynter what he meant, and Paynter told him today was the day we found out if we got to become Union or not." Paynter understood this to be the date "we would either be recognized as Union or have to be elected."[7] Steele asked Paynter what he thought of the Union. Paynter told Steele that "I felt we deserved it [a union]. [W]e done the same—same work as the Union men for a third of the pay." Steele indicated he agreed with Paynter. Steele "just kind of shrugged his shoulders and I heard somebody either holler for him or he said he was busy, . . . I believe he said he had to go. And that was pretty much the end of that." Paynter added (although it had to be suggested to him in leading questioning) that in the conversation he mentioned to Steele that the union leadership was going to speak to Dynamic about the M&P employees "going Union."

M&P employee Phillip Coleman testified that the morning of March 11, as he was preparing a bulldozer, Tracy Steele "pulled in and asked me what the good news was that Steve [Paynter] had told him about." Steele said that Paynter "told him today was the big day, and he asked him what for, and he said that it was the day we find out if we're going Union."

Coleman, having previously been told by Paynter to keep the card signing "top secret," at first denied to Steele that he knew anything about the matter. Steele declared "I'm happy for you," and suggested "You know you've always wanted to go," but Coleman continued falsely to tell Steele that he did not know what Steele was talking about. Steele continued, asking Coleman if he had "signed any papers" and Coleman continued to feign ignorance, responding "No, what papers are you talking about?" Steele said, "you know, you sign papers or card if you want to go to the Union," Coleman testified that Steele said "[I] thought maybe you had." Coleman again denied signing anything and Steele told him his "lips w[ere] sealed" and "not to worry about nothing." At this point, Coleman "felt like he knew anyway[ ]" and told Steele that he had signed a card. Steele "told me that he kind of figured that we had," because of Underwood previously asking him for the M&P employees' names and phone numbers. Coleman asked Steele if "it would be bad," and suggested that the union campaign could cause problems.

[7]Paynter explained at the hearing that he "actually misunderstood" and now knew he "wasn't exactly sure how all that worked."

Steele agreed, "Yeah, it could," and they laughed. Coleman returned to his work and Steele moved on.[8]

That evening, Billy Bob Marcum, the general manager of Coal Mountain operations, was summoned to a dinner meeting with Thomas Lusk, the CEO of Mechel Bluestone. The meeting was conducted at a restaurant in Gilbert, West Virginia, owned by Pay Car (a Mechel Bluestone mine) Superintendent Randall Lester and/or his wife, the mother of M&P employee Champagne.

Marcum met Lusk at the restaurant between 7 and 9 p.m. They were joined by Sid Young, then director of mining operations for Mechel Bluestone, Pat Graham, a Mechel Bluestone official who "is familiar with all the outside services throughout the companies," and Randall Lester also joined them at some point. Lusk testified that he told Graham he "wanted to have a meeting specific to Coal Mountain." According to Lusk, there had been prior ongoing discussions with Marcum since he began work about "reducing manning at Coal Mountain, and that it would have to happen." He described "constant pressure" prior to this, from Mechel higher ups to layoff employees and streamline the mining operations.

According to Lusk, "we had had enough discussions . . . I wanted to meet directly with Billy Bob [Marcum] and Pat [Graham] and discuss what our next steps were going to be." Marcum testified that at the meeting, Lusk "very clearly outlined his objective and directive" about "streamlining" and "asked me where I thought I could start the process, that it [ ] needed to start immediately." Marcum "offered up" that he knew "exactly where I can start" and that was with M&P. He told Lusk that he would lay off the M&P employees the very next morning. Lusk testified that Marcum "told me that immediately we could eliminate these M&P support people because we had the people, the manning, that could do the work already there. That it would not impact operations and it would reduce costs."

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[8]Both Paynter and Coleman were good witnesses: they struck me as honest and earnest in attempting to recall details of events, some of which was clearer to them than others. I have no doubt that they had these conversations with Steele. Steele did not testify. No explanation for his absence was offered. According to records entered into evidence, Steele remained in the employ of the Respondent at the time of the hearing. Steele's testimony could have played a central role in the Respondent's defense, if it would have been favorable to the Respondent. This is a suitable case to draw the inference that Steele's testimony would have been adverse to the Respondent on any factual matters about which he was likely to have had knowledge. *Daikichi Sushi*, 335 NLRB 622, 622 & fn. 4 (2001).

The only conflict between the testimony of Paynter and Coleman was that Paynter placed the conversation with Steele on the afternoon of March 11, while Coleman seemed certain their conversation had occurred in the morning, at the beginning of the day shift. Coleman's testimony on this struck me as surer on this point, and as was his certainty about the work he was doing—"Pre-shifting a dozer," which happens at the beginning of the shift—when Steele approached him to talk about what Paynter had just told him. I find that the conversation between Steele and Paynter, and then Steele and Coleman, occurred near the start of the shift. I credit Coleman's testimony about these events in its entirety and I credit Paynter's testimony about these events in all respects save for the time of day of his conversation with Steele.

I note that it was pointed out that in Coleman's pretrial affidavit he stated: "At the time I was fired, no one said anything about a Union card. No management, no member of management ever said anything to me about signing a Union card." I accept (and credit) Coleman's explanation (Tr. 351) on redirect questioning that this statement truthfully denied that there was any mention by the Respondent to him of union cards at the time of (or any time after) termination. It does not conflict with his testimony regarding Steele's conversation with him.

Marcum testified that he had heard "on one occasion" that there was the possibility that the M&P employees had been signing union cards. He was told this by Tracy Steele "days before" or maybe "weeks" before. Marcum told this to Lusk during the dinner meeting. Lusk says Marcum told him about the card signing after Lusk gave Marcum the "go-ahead to make the reductions." According to Lusk and Marcum, the card signing had no impact on the decision.

Later that night, after the dinner meeting Lusk sent an email to a number of Mechel officials, as well to the heads of other Mechel Bluestone mines. The email was described by Lusk as "a directive from me to the people in the field to take all necessary actions to reduce outside services and place them on a bid basis."[9] The email, which carried the subject heading "Mine Overhead," stated:

> It is imperative that all efforts be applied to reduce mine overhead. In that effort, I am directing all Mine Managers to make immediate and drastic reductions to all non direct production related expenses. All support services should be suspended unless directly involved in support and lading activities. All support activities must be placed on a "Bid Basis" and the low cost provider awarded the bids for these services. Direct all bids and descriptions of services needed to Rob Young, Purchasing Director. Any ongoing activities are to be stopped and the work put on a bid basis. No Exceptions.[ ]

The next morning, March 12, Marcum arrived at work early, identified exactly who the M&P employees were, made a list of the employees who were to be terminated, and prepared a note to guide his explanation that he planned to give them at the beginning of the shift.

As employees arrived for the day shift on March 12, most were greeted by Steele at the "portal" by the parking lot, where Steele typically gave them their assignments for the day. Steele found some other employees near the scalehouse. On this morning, Steele told them to wait in their cars at the parking lot and said that he would be right back to talk with them. As other employees arrived, they relayed the instructions to the new arrivals.

Steele returned accompanied by Marcum and Bluestone Safety Manager Eddie Miller. Some of the employees had remained in their cars, others were standing outside. Marcum motioned for the employees to assemble by the portal where they stood in a circle. Marcum took roll to ensure that everyone was present. He had a list of the employees to be terminated and he read off the names.

Marcum, and each of the testifying employees, recalled Marcum's comments slightly differently, but there is no dispute of any significance. Marcum testified that he told the employees there was "no more work until further notice." Employees testified that Marcum began by saying "he was sorry [,] he had something to say and he was sorry." He said that there were "cut-backs" and that "they had no more work for us." There was "nothing for us to

[9]The email was sent to Sid Young, director of field operations for Mechel who had responsibility for Keystone mining operations; Kirby Bragg, the General Manager at the Red Fox operations, Bob Cochran, the nominal but soon-to-be-leaving superintendent of Dynamic (who had already been effectively supplanted by Marcum), Rodney Hamilton, the head of HR for Mechel Bluestone, and to a number of Mechel officials, including Alexander Virula to whom Lusk reported.

do" and that the employees were being laid off until "further notice." At this time, "our employment was no longer necessary." One of the employees asked if he and the others could get a layoff slip, and Marcum said he would have to get back to them on that. Employees asked about their paychecks and were told they could pick them up later that day. Marcum told the employees they would have to leave the mountain. One Justice Highwall employee who was there, preparing for work alongside the M&P employees, approached Marcum because he did not hear his name called. Marcum told him, "this does not concern Justice Highwall."[10]

The one second shift employee equipment operator, Shawn Sheppard, received a phone call at home from Eddie Miller at approximately 10 a.m., informing him that "M&P Services was no longer needed until further notice."

Two M&P employees, Joshua Hatfield, and Tim Walls work at the scalehouse weighing trucks. Hatfield works first (day) shift and Walls works second (evening) shift. Neither was laid off March 12.

In addition to the six equipment operators terminated the morning of March 12, six additional employees, at least five of who were security guards, were terminated that day.[11]

Four of the six terminated M&P (unit) employees (Brown, Coleman, Paynter, and Sheppard) sought work and were hired at one or more unionized Mechel Bluestone mines within a couple of weeks of their termination from Coal Mountain.[12] Champagne went to work on Monday, following the Friday, March 12 termination, at the nonunion Mechel Bluestone mine, Pay Car, where his stepfather Randall Lester was superintendent. Lester requested, and Lusk approved the hiring. Blankenship was offered employment at a Mechel Bluestone mine, but felt it was too long a drive from his home (2½ hours one way).[13]

Records introduced into evidence reveal that, other than the M&P terminations, there were no other downsizings, group terminations, or other layoffs related to cost savings or streamlining in the weeks before or after the M&P terminations, including among M&P or Justice Highwall employees working at Mechel Bluestone locations other than Coal Mountain.

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[10]While employees recall being told they were "laid off" or that there was no work "until further notice," there is no dispute about the fact that this was a termination from M&P. I note that the Respondent M&P admitted in its answer that these employees were "discharged" on March 12, 2010. (R. Answer at par. 6(a).)

[11]The six were Billy Toler, Elvis Walker, Kala Thompson, Thomas Ooten, Selina Osborne, and Debra Pendry.

[12]The evidence suggests that union organizer Cogar encouraged the employees to apply at Mechel Bluestone mines he knew to be hiring, but there is also evidence that Mechel Bluestone's human resources director was independently directed by Mechel Bluestone CEO Lusk to contact the terminated employees and offer them work at Mechel Bluestone facilities that needed employees.

[13]Three of the five terminated guards were quickly called back by Bluestone (or Dynamic) office personnel and rehired by the outside contractor company that took over the guard duties at Coal Mountain. Another one of the terminated guards, Debra Pendry, was rehired by Dynamic as an office assistant on the Monday (March 15) after her Friday (March 12) termination.

Dynamic hired 17 additional bargaining unit employees between March 11 and the end of June 2010, most of who were rock truck drivers. Five union employees quit/terminated/ resigned during this period. Justice Highwall hired seven additional hourly employees after March 12 through the end of June 2010, but none at the Dynamic site. There were four quits/terminations/transfers during this period, including two who were working at the Dynamic site. M&P hired seven employees from March 11 through the end of June 2010, but none to work at the Dynamic site. There was one resignation and one transfer (to Justice Highwall) during this period.

Analysis

Section 8(a)(3) of the Act provides, in relevant part, that it is "an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). Under Section 8(a)(3), the prohibition on encouraging or discouraging "membership in any labor organization" has long been held to include, more generally, encouraging or discouraging participation in union activities. *Radio Officers v. NLRB*, 347 NLRB 17, 39–40 (1954). The discharge of an employee for the purpose of thwarting or retaliating against union activity violates Section 8(a)(3). As any conduct found to be a violation of Section 8(a)(3) would also discourage employees' Section 7 rights, any violation of Section 8(a)(3) is also a derivative violation of Section 8(a)(1) of the Act. *Chinese Daily News*, 346 NLRB 906, 934 (2006), enfd. 224 Fed. Appx. 6 (D.C. Cir. 2007).

Here, the government alleges that the March 12, 2011 termination of the six proposed bargaining unit M&P employees was motivated by unlawful retaliation for the union activity.

The Supreme Court-approved analysis in cases turning on employer motivation was established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983) (approving *Wright Line* analysis). In *Wright Line,* the Board determined that the General Counsel carries the burden of persuading by a preponderance of the evidence that employee protected conduct was a motivating factor (in whole or in part) for the employer's adverse employment action.

The General Counsel's proof of unlawful motivation for the adverse action can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004), enfd. 184 Fed. Appx. 476 (6th Cir. 2006); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003).

In a *Wright Line* case, the General Counsel's initial burden is to establish that antiunion animus was a motive for the adverse employment action. "The elements commonly required to support such a showing are union or protected concerted activity by the employee, employer knowledge of that activity, and union animus on the part of the employer." *Kentucky River Medical Center*, 355 NLRB No. 129, slip op. at 2 fn. 5 (2010); *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999).

Such a showing proves a violation of the Act subject to the following affirmative defense available to the employer. The employer, even if it fails to meet or neutralize the General Counsel's showing, can avoid the finding that it violated the Act by demonstrating by a preponderance of the evidence that the same adverse employment action would have taken place even in the absence of the protected conduct. *Williamette Industry, Inc.*, 341 NLRB 560,

563 (2004); *Wright Line*, supra. For the employer to meet its *Wright Line* burden, it is not sufficient for the employer simply to produce a legitimate basis for the adverse employment action or to show that the legitimate reason factored into its decision. *T. Steele Construction, Inc.*, 348 NLRB 1173, 1184 (2006). In the face of the General Counsel meeting his initial burden, in order for the employer to avoid a finding of violation, it must "persuade" by a preponderance of the evidence that it would have taken the same action in the absence of protected conduct. *Carpenter Technology Corp.*, 346 NLRB 766, 773 (2006) ("The issue is, thus, not simply whether the employer 'could have' disciplined the employee, but whether it 'would have' done so, regardless of his union activities"); *Yellow Ambulance Service*, 342 NLRB 804, 805 (2004) ("Once a discharge has been show to be unlawfully motivated, an employer must establish not merely that it *could have* discharged the employee for legitimate reasons, but also that it actually *would have* done so, even in the absence of the employee's protected activity") (original emphasis).

In this case the General Counsel has met his burden of demonstrating that the employees' union activity was a motivating factor for the terminations. First, the employees' union activity is clear. Each and every member of the proposed bargaining unit signed a union card and cooperated with the union organizers in doing so.

Second, the Respondent's knowledge of the employee union activity is proven. Tracy Steele was an agent of the Respondent.[14] He provided daily supervision of the employees for Marcum (whether or not he was a statutory supervisor under the Act) and in that capacity showed a friendly but decided interest in the employees' union activities. After Union Representative Underwood sought M&P employee information Steele raised it with employee Paynter and offered his suggestion that Underwood wanted the information to assist the M&P employees to start their "own Union." On March 11, Paynter, "let the cat out of the bag" and told Steele that "today was the day" that the union status of the employees would be decided. It is,

[14]Although disputed by the Respondent, Steele's agency status, within the meaning of Sec, 2(13) of the Act is not open to serious question. "The Board's test for determining whether an employee is an agent of the employer is whether, under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management." *Pan-Oston Co.*, 336 NLRB 305, 305–307 (2001). In short, "[i]t is well established that where an employer places a rank-and-file employee in a position in which employees would reasonably believe that the employee speaks on behalf of management, the employer has vested that employee with apparent authority to act as the employer's agent, and the employee's actions are attributable to the employer." *Mid-South Drywall Co.*, 339 NLRB 480 (2003). Steele, a "field engineer" by title, was not exactly a rank-and-file employee. Steele did, in fact, speak and act for management every day. On a daily basis he assigned, monitored, and checked on employees' work. For most of the M&P employees, he was their principal and a routine source of management direction. As one discriminatee explained, "[i]f we needed something . . . we would go to Tracey Steele." In one example in the record, he represented management in grievance hearings and signed the grievance disposition for management. (See GC Exh. 24.) He stood with management as the M&P employees were terminated. The employees' unanimous perception of him as a "boss" or other authority figure, as testified to by numerous employees, would be unremarkable save for the Respondents' denial of his agency status. Clearly, Steele's "work responsibilities . . . align his interests with management rather than with the [rank-and-file employees]." *Board Ford, Inc.*, 222 NLRB 922, 922 (1976). I find that Steele acted as an agent for Dynamic and M&P in its labor relations with employees and the Union.

of course, beside the point that Paynter's understanding of the recognition process was less than complete, he provided Steele with knowledge that the matter was coming to a head. Any ostensible nonchalance about this news that Steele displayed to Paynter was belied by Steele's rushing to interrogate Coleman for more details about the information obtained from Paynter. Despite Coleman's instinct that it would be better to feign ignorance, Steele eventually got Coleman to admit the union activity and discuss the matter with him. Steele's knowledge of the employees' activity is appropriately imputed to the Respondent. *Board Ford, Inc.*, 222 NLRB 922, 923 (1976); *Empire Shirt Trimming Co.*, 240 NLRB 626, 635 (1979) ("even were he not technically a supervisor, there is sufficient evidence to 'align his interests with management' and a fair inference that [he] shares his information with . . . management"); enfd. mem. 624 F.2d 1096 (5th Cir. 1980); *The Eastern Beef & Provision Co.*, 208 NLRB 756, 756 (1974) (agent's knowledge of union activities is chargeable to the respondent). The imputation of Steele's knowledge to the Respondent is particularly appropriate in this instance, where the Respondent, without explanation, failed to call Steele to testify. It is appropriate to infer that Steel's testimony would have been adverse to the Respondent on the issue of what he told Marcum and when. *Eaton Technologies, Inc.*, 322 NLRB 148, 851 (1997).

Moreover, the reasonableness of imputing this knowledge to the Respondent is at once increased—and at the same time, not required—by the fact that Marcum admitted that either days or weeks before the terminations, Steele told him that M&P employees "had a possible card signing." I find that the Respondent was aware generally of the union activities of employees when the terminations were made.[15]

Finally, the General Counsel has met his burden of proving an unlawful motivation for the terminations. Most significant is the fact that the terminations were planned the very evening of the day, and executed the very morning after, Paynter and Coleman "let the cat out of the bag" and told Steele that it was the "big day" and that the union drive was coming to a head.

The Board has long recognized that in discrimination cases "the timing of the [employer's conduct] is strongly indicative of animus." *Electronic Data Systems*, 305 NLRB 219, 220 (1991), enfd. in relevant part, 985 F.2d 801 (5th Cir. 1993); *N.C. Prisoner Legal Services*, 351 NLRB 464, 468 (2007), citing, *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004) (timing of employer's action in relation to protected activity provides reliable evidence of unlawful motivation); *La Gloria Oil and Gas Co.*, 337 NLRB 1120, 1124 (2002), enfd. mem. 71 Fed. Appx. 441 (5th Cir. 2003); *Yellow Transportation Inc.*, 343 NLRB 43, 48 (2004); *Structural Composites Industries*, 304 NLRB 729, 729 (1991).

[15]I note that "the General Counsel need not establish that the Respondent had knowledge of each discriminatee's particular union activity. It is well settled that unlawful motivation may be established when, as here, an employer takes adverse action against a group of employees, regardless of their individual sentiments toward union representation, in order to punish the employees as a group 'to discourage union activity or in retaliation for the protected activity of some.'" *Electro-Voice, Inc.*, 320 NLRB 1094, 1095 fn. 4 (1996) (and cases cited therein); *Weldun Int'l*, 321 NLRB 733, 748 (1996) ("The required unlawful motivation may be shown not only where the employer takes adverse action against individuals and employees in retaliation for union activities, but also where the employer takes adverse action against groups of employees regardless of their individual sentiments toward union representation") enfd. in relevant part, 165 F.3d 28 (6th Cir. 1998) (unpublished opinion).

In this case, the force of the inference is at its most convincing. I will discuss in some detail, below, the Respondent's proffered explanation for the terminations. But in reference solely to the timing of the matter, the Respondent's explanation is that a directive—although no written directive was produced—from Tom Lusk's higher up in the Mechel chain of command occasioned the hastily convened dinner meeting, at which it is admitted that there was reference made to the M&P employees' card signing, and at which Lusk told Marcum to effectuate cut backs, and at which Marcum immediately determined to terminate the M&P employees, and to do so without warning to employees or delay.

In other words, in terms of timing, the Respondent's contention is that it is a pure coincidence that the very evening of the day that Paynter and Coleman "let the cat out of the bag" about the union drive coming to fruition, the Respondent decided to immediately terminate all of the card signers in the morning. It is possible, in the sense that every coincidence is possible. But it defies likelihood and if it is a coincidence, it is quite an unfortunate one for this employer.

Without more, the General Counsel has met his initial burden and proved a violation of the Act, subject to the Respondent's shouldering of its duty to show that it would have terminated the employees on March 12 even in the absence of the employees' union activities.[16]

[16]In support of its prima facie case, the General Counsel also relies upon discriminatee Champagne's admission that he told a Board agent, as part of the Region's investigation into this case, that he heard Marcum say "he was trying to get rid of us because we was trying to organize a union." However, Champagne maintained at trial that his statement to the Board agent was false, a lie he told because he believed it would benefit him to do so, and for this reason he refused to sign and send in the statement to the Region. After the Region procured an order from federal court directing Champagne to comply with an investigative subpoena, Champagne met and executed an affidavit with a second Board agent. However, this sworn affidavit, apparently, did not include the statements implicating Marcum.

While the story does negatively impact Champagne's credibility as a witness, it does not lead me to credit, as truth, the statement he gave to a Board agent that he overheard Marcum say he was trying to get rid of the M&P employees because of their union activity. While there are circumstances in which recanted hearsay statements appear to be and can be relied upon as the substantive and truthful evidence (see *Conley Trucking*, 349 NLRB 309–313 (2007), enfd. 520 F.3d 629 (6th Cir. 2008)), in this instance the prior statement is unsworn, and uncorroborated—the Board agent did not testify and while Champagne's coworker and friend Hatfield testified that on the way to work the morning of March 12 Champagne mentioned overhearing the managers at his mother's diner the night before, Champagne told Hatfield that Marcum said, "I want those men off my hill." That is, for sure, suggestive, but not the same as corroborating an explicit antiunion statement. Moreover, the testimony about the disputed statement was just one (albeit, an important) part of Champagne's testimony. It is not a situation where, based on his demeanor or a pretrial statement, one felt like everything he said was a lie. This is not to say that I believe Champagne's testimony on this issue, but I do not take the further step and credit, or even consider as substantive evidence his unsworn, uncorroborated hearsay statement that the General Counsel urges me to rely upon as evidence of illicit motivation for the M&P terminations.

I turn now to a review of the Respondent's explanation for the terminations.

According to Mechel Bluestone CEO Lusk, the Russian owners, with whom he is in telephone contact at a minimum once a week, are "extremely focused on budget control." Streamlining of costs was a general and important goal at every meeting with the new owners since June 2009 when they acquired the Justice companies. Lusk testified that since the acquisition he was expected "to review and press all of our operations to comply with our manning needs."

Lusk testified that monthly "balance committee" meetings set forth the goals and plans for the company. Budget issues are reviewed during these meetings and directives issued that the responsible managers are expected to comply with. The minutes of the meetings are required to be kept in writing and are signed off on or "approved" by responsible officials. The cost of manning not associated with production is, among other things, reviewed on a monthly basis as part of this process.

The Respondent introduced into evidence the balance committee minutes from the meeting conducted March 15, 2010, three days after the M&P terminations.

Those minutes included a list of "Decisions," number 11 of which stated:

> With the purpose of reducing mine overheads, All Mine Managers to make immediate and drastic reductions to all non-direct production related expenses. All support services should be suspended unless directly involved in mining and loading activities. All support activities must be placed on a "Bid basis" and the low cost provider awarded the bids for these services. Direct all bids and descriptions of services needed to Rob Young, Purchasing Director. Any ongoing activities are to be stopped and the work put on a bid basis.

Decision 11 listed the person in charge as Lusk, with a "dateline" for reporting back of March 16, the next day. Lusk testified that on March 16 he owed his boss, Alexander Virula "an explanation . . . of what actions had been taken."

Lusk agreed that the reduction of support personnel at the Dynamic Energy mine was undertaken "pursuant to that directive," and he claimed he contacted Pat Graham, director of training and health services, about it.

Of course, the M&P terminations took place March 12, three days before the Balance Committee meeting decision, and four days before the March 11 dinner meeting at which the termination decisions were made. Indeed, it was immediately after that meeting, later that night, that Lusk issued his own directive, to a variety of Mechel Bluestone officials, including Virula, summarized by Lusk as "a directive from me to the people in the field to take all necessary actions to reduce outside services and place them on a bid basis." That email notably, was almost identical to the email listed on the Balance Committee notes three days later.[17]

[17]The email carried the subject heading "Mine Overhead," stated:

> It is imperative that all efforts be applied to reduce mine overhead. In that effort, I am directing all Mine Managers to make immediate and drastic reductions to all non direct production related expenses. All support services should be suspended unless directly involved in support and lading activities. All support

Continued

Lusk answered "of course" to counsel's suggestion that the March 15 directive had been given to him prior to March 15. On cross examination Lusk asserted that the directive to reduce mine overheads, indeed all his communications with those above him in Mechel, came through Virula. He testified that any such directive would be in writing, and "come in the form of official documents that are recorded for the record, and then distributed to all the responsible department heads."

No further evidence of or corroboration for Lusk's testimony about this directive, which was supposedly the proximate precipitant for the March 12 terminations, was provided. Lusk and Marcum testified vaguely and generally that streamlining and increasing profitability were a constant concern, well before March 12, but the record is devoid of any written directive, a description of an oral conversation, or much of anything that would explain how Lusk had the prescience to carry out a March 15 directive to "suspend" "all support services" and "to make immediate and drastic reductions to all non-direct production related expenses" on March 12.

As discussed, above, coincidence is a possible but unlikely explanation for the fact that the terminations occurred the day after (and were ordered the evening of) employees telling Steele that the union drive had reached its apogee. But given a chance to explain its decision process, the Respondent's account leaves clairvoyance as the most likely nondiscriminatory explanation for Lusk's March 11 decision to order Marcum to reduce support services pursuant to a March 15 directive. It is literally fantastic, but no rational explanation for the timing of Lusk's actions has been proffered.

Moreover, there is a probative lack of evidence that the March 15 directive was even carried out, a lapse that raises questions about its bona fides, even as of March15. If subsequent monthly Balance Committee Meeting minutes demonstrate corporate-wide action by mine managers carrying out "immediate and drastic reductions to all non-direct production related expenses" and the "suspen[sion] of "[a]ll support services," nothing was offered to show it. There is no evidence of the bidding process used, or that bids were directed to Rob Young, purchasing director. Indeed, records placed into evidence by the General Counsel show no mass layoffs or other suspension of employment of Justice Highwall or M&P employees working at the other Mechel Bluestone mines at any time in 2010. In other words, the only layoffs or terminations carried out in accordance with the March 15 decision, or Lusk's March 11 email anticipating the March 15 decision, was the M&P terminations at Coal Mountain.

Accordingly, not only has the Respondent failed to meet its burden to show that it would have taken the same action against the M&P employees in the absence of protected activity, but its contention as to the genesis of the March 12 layoffs appears pretextual. Of significance "a pretextual explanation of the employer's action will support an inference of discriminatory motivation." *Kentucky River Medical Center*, 355 NLRB No. 129, slip op. at 3–4 (2010); *All Pro Vending*, 350 NLRB 503, 508 (2007); *Rood Trucking Co.*, 342 NLRB 895, 897–898 (2004), citing *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995) ("When the employer presents a legitimate basis for its actions which the factfinder concludes is pretextual . . . . the factfinder may not only properly infer that there is some other motive, but that the motive is one that the employer desires to conceal—an unlawful motive.") (internal quotation omitted);

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activities must be placed on a "Bid Basis" and the low cost provider awarded the bids for these services. Direct all bids and descriptions of services needed to Rob Young, Purchasing Director. Any ongoing activities are to be stopped and the work put on a bid basis. No Exceptions.[ ]

Whitesville Mill Service, Co, 307 NLRB 937 (1992) ("we infer from the pretextual nature of the reasons for the discharge advanced by the Respondent that the Respondent was motivated by union hostility"), citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966). Indeed, even something short of a pretext: merely the failure to "substantiate [an] asserted rationale for not hiring [alleged discriminatees], coupled with evidence undercutting th[e] rationale," will support a finding of unlawful motivation. *TCB Systems, Inc.*, 355 NLRB No. 162, slip op. at 3 (2010).

Thus, the General Counsel's prima facie case is actually bolstered by the Respondent's unsupported and unbelievable claim that a directive from Russia to suspend and put out for bid all non-mining ancillary operations prompted the March 12 termination of the M&P employees.

Notably, the M&P work continued to be performed at Coal Mountain, some by newly hired Dynamic employees, some by non-mechanic Justice Highwall employees, and in some cases by outside contractors. The Respondent stipulated that there was no reduction in labor costs at Coal Mountain for a period of at least three months following the termination of the M&P employees.

Other explanations for the termination of the M&P employees have a make-weight quality to them. Marcum testified that the former owner of Coal Mountain, in order to get the best price from Mechel for the property, concentrated on production at the expense of reclamation work. This, according to Marcum, left a lot of reclamation work that needed to be done, but that as M&P worked through it in the spring it left less reclamation work for it to do. No objective evidence of this was provided. Assuming there is truth to it, its force as an explanation for the mass layoffs is undercut by the fact that with Marcum's arrival at Coal Mountain there was a significant increase in stockpile work and M&P employees and, to a lesser extent some of the Justice Highwall employees were deeply involved in that. Putting aside the dispute over whether M&P employees performed stockpile work before Marcum's arrival, it is agreed by all parties that after Marcum's arrival, this work was performed regularly by M&P employees until their termination. Thus, even if there was less reclamation tasks, there was an increasing amount of stockpile work that kept the M&P employees busy. The evidence that the M&P employees lacked work cannot be demonstrated on this record.

I also do not put credence in the suggestion that the "burden" of the union grievances over work to which M&P was being assigned (stockpile and road work) contributed to the Respondent's decision to terminate the M&P employees. At the time of the terminations, the Respondents continued to take the position that contractors (including M&P employees) were entitled to do the disputed work, and non-Dynamic employees continued performing such work after the M&P terminations. Indeed, Marcum was overheard telling Steele, with regard to the grievances filed by the Union over M&P employees' work, "if these guys are needed to do this, or do that, then you . . . put them there. You let me worry about the grievances."

In April, the Respondent settled a grievance (filed in February) about contractors performing road work and agreed it was work for Dynamic unit employees. And in late August, the Respondent agreed to have Dynamic unit employees perform the stockpile work, but only after contesting the matter through the grievance procedure to arbitration. But that was in August. As of the March 12 discharges, and well after, the Respondent did not hesitate to assign non-Dynamic employees to perform the disputed work. The Union's grievances did not

motivate the Respondent to terminate the M&P employees. Notably, this rationale for eliminating the M&P employees was not articulated to the M&P employees.[18]

The argument of Respondent's with the most force is a general plea of its lack of interest in animus: at Coal Mountain virtually all employees, at Dynamic, and now at Justice Highwall are union represented. M&P's 8-person unit amounted to the proverbial gnat on an elephant's back. This, the Respondent contends, demonstrates that it is without antiunion animus, and, as more evidence of this, the Respondent points out that the terminated M&P employees were soon offered work at other Mechel Bluestone operations, mostly at unionized operations. And, perhaps even more persuasive, the Respondent points out that the unionization of M&P "was of no practical significance in the context in which the Coal Mountain operation" carried out its work. Why would the union drive rouse the Respondent to disband the unit?

These are points worth making, but none answer the evidence in support of the General Counsel's case, in particular, the highly suspicious timing of the discharges and the pretextual account of the decision offered by the Respondent. The Respondent's willingness to deal with the Union at Dynamic does not disprove anything about its conduct with regard to M&P. At most it proves only that the Respondent is practical, not rigidly ideological. That employees were rehired elsewhere in the Mechel Bluestone enterprise suggests a lack of personal animus toward these employees, but does not answer the charge of antiunion animus toward the unionization of the M&P bargaining unit.

It has to be remembered that the practical insignificance of M&P's unionization to the Coal Mountain operation is matched by the insignificance of the M&P to Coal Mountain's operation. This, indeed, is the most the Respondent has proven. Marcum's explanation of the alleged reasons for the terminations explains convincingly how the Respondent believed it could dispense with the M&P operators and shift the work to Justice Highwall, outside contractors, and Dynamic employees. He described the M&P employees as "excess baggage," using rented equipment, and performing a hodge podge of unskilled work "anywhere we could keep them busy." The variety of unskilled tasks they performed could easily be absorbed into the larger Coal Mountain operation. As Lusk told Marcum "we could eliminate these M&P support people because we had the people, the manning, that could do the work already there. That it would not impact operations and it would reduce costs." It made little difference to the Respondent who performed this unskilled work. The same could not be said for the mechanical maintenance work performed by Justice Highwall employees, which may explain why that union campaign went to an election during this same time period without any discharges. This would also explain why the only two M&P unit employees spared discharge were Hatfield and Walls, who, unlike the other M&P employees, worked in the scalehouse apart from the others. They too, were card signers, but their work remained central to the operation and their absence could not as easily be absorbed.[19]

The Respondent then, may be said to have proved that termination of the M&P employees was of no great significance to the overall Coal Mountain operation. Stretching the

[18]Initially, Marcum also did not mention this as a reason for terminations in his testimony. Subsequently, at the suggestion of counsel, Marcum testified that the Union's assertion of its work jurisdiction was "an additional burden."

[19]At the time of the hearing the Respondent was training Tracy Steele, Debra Pendry, and a Justice Highwall employee named Toller to learn the scalehouse work, so they could fill in if Hatfield or Walls needed a day off.

point, the Respondent may even have been said to have proved that it had a legitimate economic rationale for getting rid of M&P at Coal Mountain. But it has utterly failed to prove—in light of the extremely suspicious timing of the terminations, unexplained by the discredited pretext that the terminations and dinner meeting were undertaken pursuant to an unproduced directive from Russia implemented at no other facility and against no other employees—that it would have terminated the M&P employees on March 12 in the absence of the employees' union activity. That the Respondent could have, legitimately, rationally, and economically eliminated the M&P operation does not prove it would have in the absence of the union activity. This is true even, assuming, arguendo, the legitimate rationale factored into the decision. *Turtle Bay Resorts*, 353 NLRB 1242, 1243 (2009) ("We find instead that the Respondents proved the existence of a legitimate reason for disciplinary action, but that the discharge was nevertheless unlawful. It is not sufficient for a respondent employer simply to produce a legitimate basis for the action in question or to show that the legitimate reason factored into its decision"); *T. Steele Construction, Inc.*, 348 NLRB 1173, 1183 (2006) ("The Respondent cannot meet its Wright Line burden merely by showing that a legitimate reason factored into its decision. Rather, the Respondent must show that the legitimate reason would have resulted in the same action even in the absence of the employee's union and protected activities"); *Carpenter Technology Corp.*, 346 NLRB 766, 773 (2006) ("The issue is thus not simply whether the employer 'could have' disciplined the employee, but whether it 'would have' done so, regardless of his union activities).[20]

I find that the General Counsel has met his burden of showing that antiunion animus was a motivating factor in the termination of the M&P employees. In part, this showing is buttressed by the false and pretextual claims by the Respondent as to its decision to terminate the employees. However, to the extent that this is, in fact, a dual motive case and the Respondent was, in part, motivated by an economic rationale to release the M&P employees, I find that it has failed to carry its burden to prove that it would have carried out the March 12 terminations in the absence of the employees' union activity. I find that the Respondent violated Section 8(a)(3) and (1) of the Act as alleged in the complaint by its termination of the M&P discriminatees.[21]

[20]I must add that for the most part, Marcum struck me as a reliable witness, who labored to honestly answer the questions put to him by counsel of all sides. I even think he accurately explained why the Respondent could afford to terminate the M&P employees and carry on the mine's ancillary work without them. He provided an economic rationale for the terminations that was accurate, as far as it went. But given the factors cited in the text, I cannot accept, and I discredit Marcum's conclusory assertions that antiunion animus was not a motivating factor in the timing of and decision to make the terminations. I also do not accept that Marcum or Lusk provided a full account of the dinner meeting or the reasons the decision was arrived at to terminate the M&P employees.

[21]The M&P guards were also terminated March 12. Under the theory of the General Counsel's case, they might also be victims of the Respondent's unlawfully motivated mass layoff (although most or all were quickly rehired at the site). However, in that absence of any allegation or argument that these employees were discriminatees, I do not consider this issue.

2. The Justice Highwall and Dynamic Energy Complaint
Cases 9–CA–46095 and 9–CA–46096

A. Alleged independent 8(a)(1) violations

Section 7 of the Act states in relevant part that,

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities. [29 U.S.C. § 157.]

Pursuant to Section 8(a)(1) of the Act, it is "an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [of the Act]." 29 U.S.C. § 158(a)(1).

The question of whether an employer has violated Section 8(a)(1) of the Act is an objective one requiring an assessment of all the surrounding circumstances; the inquiry is whether the disputed statement or conduct would reasonably tend to coerce or interfere with employee rights. *Sprain Brook Manor Nursing Home*, 351 NLRB 1190, 1204 (2007); *Miller Electric Pump & Plumbing*, 334 NLRB 824, 825 (2001); *Rossmore House*, 269 NLRB 1176 (1984), enfd. 760 F.2d 1006 (9th Cir. 1985). The Board has noted in this regard that the context in which statements are made can supply meaning to the otherwise ambiguous or misleading expressions if considered in isolation. *Debbie Reynolds Hotel*, 332 NLRB 466, 475 (2000).

Below, I consider, in turn, the various independent 8(a)(1) allegations alleged against the Respondent.

1. Interrogation, solicitation, and promises related to decertification (paragraph 6(a)).

Billy Hatfield has worked as a mechanic at Justice Highwall since July 2008. For most of his employment he worked on the second shift. At the time of the April 23, 2010 representation election his shift supervisor was Michael Justice. Michael Justice reported to David Street, who was the maintenance foreman.

Before the election, Justice had on different occasions told some of the employees that "we was making a mistake by even trying to go union." After the election, Justice would occasionally express unhappiness that the employees had voted for the Union.

One evening, after the election, on May 12, Hatfield was working second shift at approximately 7 or 8 p.m., when he needed a part from the parts trailer. Hatfield radioed for Justice to bring him the part, which was a standard practice. Instead, Justice came by and told Hatfield to ride with him to get the part from the parts trailer. On the ride, Justice asked Hatfield whether he was "happy." Hatfield asked him what he meant. Justice asked whether Hatfield was happy "with the way things were going with the Union." Hatfield told Justice he wasn't happy with the wage rates. Justice told Hatfield that he had called Tom Lusk and told Lusk there are "several guys that w[ere] not happy with the . . . Union, and if there was any way we could change things." Justice said that Lusk had told him "that he didn't start the mess, and he

wasn't going to try to clean the mess up. But if Mike would get a Petition and could get a hundred percent people to sign off on it, talking about the Union guys, that they could send it to the Labor Board and have the decision reversed."

Justice told Hatfield that he needed his help. Hatfield testified that "because of my . . . stature with [the] work[force] because of my age, I figured because I was a preacher"—Hatfield is a Pentecostal preacher—"a lot of guys, all of them's younger than I am, and they have a tendency, I guess, to believe me or trust me. And they do come to me from time to time with different questions, we talk."

Hatfield recalled Justice saying "that I would probably be able to persuade them to sign it, and he needed my help with that." Justice told Hatfield that

> if we could get this to work for us, that then it was a good possibility that he could get us some more money than what we was making. He could get us the tools that we actually need to work with, he said, but the way things were right now, that was—his hands were tied.

Hatfield told Justice he would "check and see what the other guys thought . . . but I never did." Hatfield "didn't tell him yes or no, but then . . . he never came back to me after that. That was about as far as we went."

Hatfield's fellow second shift Justice Highwall mechanic Chad Cline also testified that on May 12 he was approached by Mike Justice at the end of his shift. Justice told Cline that "it may help you to get rid of this union. All you got to do is sign a paper." Cline told him "no" and went to his car.

Justice did not testify. On brief (R.Br. at 6), the Respondents represent that he had previously been terminated and was "hostile to the Company and unwilling to testify."

Lusk testified and denied that he made the statements attributed by him to Justice. Lusk testified that Justice called him at home one evening in May and said that employees were approaching him, wanting to decertify the Union. Lusk testified that he told Justice that "we cannot in any way interfere or involve ourselves in that," and "[i]f the workers want to do something like that they must contact the NLRB and we had to stand aside."

Hatfield and Cline's account of what Justice told them is uncontradicted.[22] There is, however, a complication that gives me more than a little pause. Apparently, Hatfield, with the assistance of the union organizer, drafted a statement for Cline about the event, which Cline signed. In his testimony, Cline stated that the signed statement was not an accurate account of the incident but included elaborations—statements that Justice did not make, though Cline said "he was headed that way with it." The statement (according to the questions of counsel and testimony) contained claims about offers of money and tools that Cline denied were said to him by Justice. That sounds similar to what Hatfield testified *he* heard from Justice. Hatfield was not asked about and did not mention the statement in his testimony. On brief, counsel for the General Counsel admits (GC Br. at 16) that the letter "contained some inaccuracies."

[22] I can understand the reluctance of the Respondent to subpoena Justice if it believed him to be hostile, but he was the only other party to the conversation with the Hatfield and Cline.

The letter was initially offered into evidence by counsel for the General Counsel, but after objection from Respondents' counsel, the offer was withdrawn. It is not in evidence. I did not read it. Had it been introduced it may have decisively undercut the credibility of Hatfield and Cline's testimony, as it is very odd (and that is charitably phrased) that a witness would draw up and another sign an inaccurate, exaggerated version of events.

But it is not in evidence, all we have is the testimony about it. While the testimony about the statement is troublesome, I believe that the less egregious, consistent story told by Cline and Hatfield at trial was more likely than not true. While the testimony about the statement leaves me with some doubts, it does not lead me to believe that nothing happened between Justice and these two employees. On balance, I credit their uncontradicted, and credibly conveyed trial testimony of what Justice told them.[23]

While I believe Justice said what Hatfield and Cline say he said to them, I do not credit, for the truth of the matter asserted, the statements that Hatfield says that Justice attributed to Lusk. At trial, the Respondent admitted that Justice was a supervisor, and CEO Lusk's statements are admissible as nonhearsay substantive evidence because both Justice and Lusk's alleged statements are admissions of a party-opponent. See Fed.R.Evid. 801(d)(2)(D), and 805. However, Lusk denied making any such comments. In light of Lusk's denial, Justice's absence, and particularly in light of the credibility concerns raised by the "inaccurate" statement prepared by Hatfield and signed by Cline, I do not credit the contradicted portion of the evidence: i.e., Justice's claim that Lusk was the source of the petition instructions.

Analysis

The government alleges that Justice Highwall shift supervisor Stephen Michael Justice's May 12 comments to Billy Hatfield and Chad Cline violated Section 8(a)(1) of the Act.

As found, above, Justice asked Hatfield if he was "happy" with "the way things were going with the Union." Justice sought Hatfield's support in getting a petition together that could be used to reverse the Union's board certification. Justice told Hatfield that if the petition was successful, "then it was a good possibility that he could get us some more money than what we was making" and better tools to work with, but that "the way things were right now . . . his hands were tied." Justice approached Cline and told him that "to get rid of the union . . . [a]ll you got to do is sign a paper."

The suggestion that the union's removal will lead to an economic benefit, or that its presence precludes it, is an unlawful promise of benefit. *Highland Yarn Mills, Inc.*, 313 NLRB 193, 207 (1993). In the context of making such an unlawful promise, it is particularly unlawful to attempt to instigate a decertification petition and encourage Hatfield to convince other employees to withdraw allegiance from the Union. *Manna Pro Partners*, 304 NLRB 782, 790 (1991); Cypress *Lawn Cemetery Assn.*, 300 NLRB 609, 626 (1990); *Baker Manufacturing*, 218 NLRB 1295, 1297, enfd. mem. 218 NLRB 1295 (1975). With Cline, Justice directly encouraged

[23] I reject the Respondent's contention (R. Br. 7, 19–20 & fn. 2) that Cline's testimony (misquoted by the Respondent) that Justice said signing the paper would "help you to get rid of this union" suggests (much less proves) that Cline approached Justice about wanting to decertify the Union. Similarly, I do not rely on Lusk's hearsay testimony that Justice told him that employees were approaching him wanting to testify, and I particularly do not rely upon it to show that Cline did so.

him to "sign a paper" in order to "get rid of the union." Contrary to the Respondent's suggestion, there is no credited record evidence that Cline had sought information on how to "get rid of the union." Justice's encouragement and solicitation is unlawful. Moreover, as part of this unlawful process, Justice interrogated Hatfield about his feelings about the Union. Whether such an interrogation is always unlawful, it is unlawful here, in the context of an illegal effort to instigate a decertification campaign. This is because the question about Hatfield's union sympathies was a predicate for, and part of, an unlawful effort to enlist Hatfield to spearhead a decertification campaign, the success of which, Justice unlawfully suggested, would lead to higher wages and better tools for employees. Thus, "the questioning did not occur in a context free of other coercive conduct." *Demco New York Corp.*, 337 NLRB 850, 851 (2002).[24]

I conclude that the Respondent violated the Act as alleged in paragraph 6(a) of the Justice Highwall complaint.

2. Telling an employee that management wanted the mechanics to quit (paragraphs 6(b) & 6(c))

In the months after the representation vote, a number of Justice Highwall employees at Coal Mountain quit and one was discharged. By September 3, 2010, out of 15 Justice Highwall employees, four had quit, and one had been terminated. None had been replaced.

In early fall 2010, Billy Hatfield asked maintenance foreman Terry Church "if [the Employer] had any intention of replacing the job mechanics." According to Hatfield, Church responded by saying that Marcum "had no intention of replacing job mechanics, that they was going to replace us with contractors."

Hatfield had worked 2nd shift since he began with Justice Highwall in July 2008. At some time in the summer, after a couple of mechanics had left, Hatfield asked Church about transferring to the day shift. Hatfield felt he was next in line, as the two 2nd shift employees senior to him were not interested. Church said he would check on it for Hatfield. Church got back to Hatfield and said that Marcum had said "they w[ere[n't] going to le[t] nobody transfer shifts, they'd have to stay on the same shift." However, subsequently in September, after his wife became ill, Hatfield went back to Church and maintenance foreman Tim Runyon and asked whether, in light of his wife's health, he could go to day shift, at least temporarily. They said they would look into it. When they got back to Hatfield they told him that Marcum had approved the switch to day shift.

In October, Hatfield moved to day shift. At this time he began taking an "80-hour course" that would qualify him to work in an underground mine. Hatfield asked Church whether "there's any possibility that if I take my 80-hour course, that Tom would let me transfer to the deep mines?" Church said he would ask. The next day Church told Hatfield that he had asked Lusk about it and Lusk said "I don't want to hear anything out of those mechanics down there. . . . [T]he only thing I want to hear from those mechanics is I quit." Hatfield testified that Church made such comments more than once, the last time in November.

[24]Whether the questioning of an employee constitutes an unlawful coercive interrogation must be considered under all the circumstances and there are no particular factors "to be mechanically applied in each case." *Rossmore House*, 269 NLRB 1176, 1178 (1984), enfd. 760 F.2d 1006 (9th Cir. 1985); *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). I note, however, that in general, it is unlawful for an employer to inquire as to the union sentiments of its employees. *President Riverboat Casinos of Missouri*, 329 NLRB 77 (1999).

Lusk testified that he did not recall any conversation with Church in which he told Church he wanted Justice Highwall employees to quit. Lusk testified that, as CEO, "I wouldn't involve myself in discussions about employee transfers on shift on any job." Lusk added that it "would be extremely strange" for Church to call the CEO to ask about a shift transfer. Lusk testified that such a question would have been directed to Marcum.

Church did not testify. I credit Hatfield's, credibly offered account. I do not reach the question of whether Lusk made the comments to Church that Church attributed to him. In other words, I assume without deciding that he did not.[25]

Analysis

It is a violation of Section 8(a)(1) of the Act to invite employees to quit or resign in response to protected activity. *Chinese Daily News*, 346 NLRB 906, 906, 919 (2006) (violation of 8(a)(1) to tell employee to resign if she was not happy with her job where context suggests statement is in response to concerted activity), enfd. mem. 224 Fed. Appx. (D.C. Cir. 2007); *McDaniel Ford, Inc.*, 322 NLRB 956, 956 fn. 1 and 962 (1997). Such comments are coercive "because it conveys to employees that support for their union or engaging in other concerted activities and their continued employment are not compatible, and implicitly threaten discharge of the employees involved." *McDaniel*, supra; *Intertherm, Inc.*, 235 NLRB 693, 693 fn. 6 (1978) (unlawful to tell employee that if "he was not happy with the Company, he should look elsewhere for a job."), enfd. in relevant part, 596 F.2d 267, 275–276 (8th Cir. 1979).

In this case Church told Hatfield, after Hatfield's inquiry into the possibility of transferring to an underground mine that, in response, Lusk had said that "the only thing I want to hear from those mechanics is I quit."

Church's comment (citing Lusk) was not explicitly in response to concerted activity by Hatfield. The request for a shift change that prompted the comment was not concerted activity. But still, the comment must be considered in the full context and circumstances. It is surely unusual for a manager to tell an employee that the CEO would like them all to quit, and that was the gist of the comment to Hatfield. It is even more unusual to express the desire that employees quit as a way of rejecting an employee's request for a shift change. It highlights to the employee that the employer's dissatisfaction is such that a shift change request will not only be denied, but is the least of the employee's problems with this employer.

Under the circumstances, how would this comment reasonably be understood? Although implicit, under the circumstances I believe that this comment would reasonably be understood by any Justice Highwall employee as a response animated by and associated with the Respondent's dissatisfaction with the employees' union drive. There is no other reasonable explanation for management's hostility. Clearly, the Respondents, and Lusk specifically, had opposed the Union drive, with Lusk telling assembled Justice Highwall employees that "we will use all of our legal efforts" to oppose representation for the Justice Highwall employees. The employees had defied Lusk and selected union representation. In the absence of any other rationale to which an employee would reasonably attribute the comment, it would reasonably be

[25]On brief, the Respondent suggests (R. Br. at 7, 20) that Hatfield's account should be discounted because he testified that did not have any conversations with Terry Church "about the Union." But this is not, as the Respondent claims "inconsistent" with his testimony. He and Church did not speak about the Union; neither mentioned the Union in their conversation about Lusk wanting the Justice Highwall employees to quit.

understood as a response to the employees' union activity. Although the link to union activity is implicit, such a comment conveys that because of the employees' union activities the employer no longer desires that they remain in its employ, and that requests for shift consideration are therefore not a possibility. That suggests that union activity and continued employment—and the granting of a request for a shift change—are incompatible, a clearly unlawful threat. *McDaniel*, supra. The comment highlighted this I find that it was a violation.[26]

Given my findings, I decline to reach the similar allegation alleged in paragraph 6(c) of the complaint. Such a finding would be cumulative and would not materially affect the remedy.

3. Marcum's "trouble" comments (paragraph 6(d))

Aaron Fortner worked for M&P until March 1, 2010, when he was hired to work at Dynamic. In September, Fortner filed a grievance under the grievance-arbitration procedure in the collective-bargaining agreement. The grievance complained that while Fortner was classified as a dozer operator, he had been working out of classification as a coal loader operator for three months. The grievance requested that Fortner be placed in the dozer operator position and that any affected parties be made whole.

The step 2 grievance meeting was conducted September 30, 2010. Marcum and Steele were present for Dynamic. Ben Clary and Jackie Taylor were present for the Union, along with Fortner. When Marcum read the grievance he got upset and said, "this is trouble right here." Marcum told Fortner, that when he hired him, Fortner told him he would not cause him any trouble. Fortner asked if this amounted to trouble and denied causing Marcum trouble. Marcum said that yes it is, "[f]iling a grievance . . . for shit like this is causing me trouble" and complained that Fortner had not kept his promise. Clary quickly asserted that Fortner had a right to file a grievance. Marcum and Clary exchanged words about Marcum's "attitude" and Marcum complained about Clary "telling me how to do my damn job." However, Marcum agreed that everyone had a right to file a grievance and stated that "I never said he didn't have the right to file a grievance." Marcum took the position that Fortner's out-of-classification assignment was permitted under the contract and denied the grievance. The parties soon moved on to other matters and Fortner left the meeting.[27]

Subsequently, a third step meeting was held on the grievance, at which, according to the documentation, the matter was referred back to step 1 for resolution. The grievance ended with either an agreement to hire or the unilateral hiring—Marcum and Clary explained it differently—

[26]The Respondent contends (R. Br. at 20) that such a comment, if made, amounted to the lawful confirmation by Church "of the fact that Dynamic might change to a different contractor," a prospect Church had previously raised when Hatfield noted that resigning Justice Highwall employees were not being replaced, and Church told him that Marcum "had no intention of replacing job mechanics, that they was going to replace us with contractors." But the comment at issue is different in one regard. The comment at issue expresses an affirmative desire that Justice Highwall employees resign. The implicit, but reasonably understood rationale for the comment is the employees' decision to unionize.

[27]My findings regarding what was stated at the meeting are based on a composite of the testimonial accounts of Marcum, Fortner, Clary, and Taylor, each of who testified about this event. While there were some differences in their testimony and the phrasing they recalled, overall the accounts were materially similar.

of someone to do the coal loader job as soon as possible so that Fortner could move to the dozer operator position. Marcum hired the new coal loader and Fortner was moved to a dozer operator position within a couple of weeks.

Analysis

The General Counsel alleges that the Respondent violated the Act when, during the grievance meeting, Marcum accused Fortner of causing "trouble" by filing a grievance.

I certainly agree that there are contexts where such a comment would have a reasonable tendency to be coercive. Filing a grievance under the terms of a collective-bargaining agreement is core protected activity. Marcum is the boss at Coal Mountain, the highest ranking official onsite and directly in charge of all operations. And contrary to the Respondent's argument, the fact that in making (and explaining) his comment, Marcum alluded back to a promise he apparently elicited from Fortner not to cause trouble if he hired him, makes the comment worse, not better, as it makes it sound like Fortner personally violated some condition of hire by bringing the grievance.

With all that in mind, still, I do not believe that Marcum's comment, in context, rises to a violation of the Act. This was a grievance meeting. Marcum, and then others, lost their temper.[28] Fortner was not alone, facing the boss's wrath. He was surrounded and represented by two union representatives who immediately rose to his defense and challenged Marcum's comment. Marcum immediately agreed that Fortner had a right to file the grievance. At no point in the meeting, or afterwards, is there any evidence that Marcum refused to entertain the grievance, or to handle it in accord with the grievance procedure. He did not express other sentiments hostile to Fortner or to those who filed grievances.[29] Marcum's comments were not, as the General Counsel overstates (GC Br. at 41), "a clear and unambiguous threat of reprisal." I do not find a violation of the Act.[30]

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[28]The Board recognizes the "fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses." *Consumers Power Co.*, 282 NLRB 130, 132 (1986).

[29]This fundamentally distinguishes this incident from the sole case cited by the General Counsel in support of this allegation, *Loose Leaf Metals Co.*, 181 NLRB 202 (1970). In that case, although found to be independent violations, the employer's repeated description of certain employees as troublemakers also involved the unlawful discharge of these employees.

[30]The General Counsel contention (GC Br. at 20) that after the incident "Fortner had no more stomach for the grievance" must be rejected. First, Fortner's subjective reaction is irrelevant. In determining the coerciveness of a remark, the Board applies an objective standard of whether the remark reasonably tends to interfere with the free exercise of employee rights. The actual effect of the remark is not relevant. *Miller Electric Pump & Plumbing*, 334 NLRB 824, 825 (2001); *Joy Recovery Technology Corp.*, 320 NLRB 356, 365 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998). Second, the only record support for Fortner's reaction is the hearsay testimony of Clary, which, upon objection, was explicitly "not . . . offered for the truth of the matter" but as a basis for explaining subsequent union action. However, on brief it is marshaled precisely for the truth of the matter asserted. Finally, nothing in Clary's account supports the contention that "Fortner had no more stomach for the grievance." To the contrary, according to Clary's hearsay account, Fortner told Clary he did not want to drop the grievance.

4. Comments linking an employee's shift transfer to his grievance activity (paragraph 6(e))

Gary Stewart has worked for Dynamic since November 2004, nearly all of that time in the pit coal loader classification, which is the top skilled and highest pay grade, grade 5. In early September of 2010 he was "realigned" from the day shift to the night shift. The transfer had its roots in a grievance dispute between the parties.

Stewart spent much of his time working at the coal stockpiles. In February 2010, Stewart reported to Dynamic employee and Union mine committee chair Ben Clary that nonunion non-Dynamic employees (i.e., M&P and Justice Highwall employees) were routinely being assigned to work on the coal stockpiles. Clary filed a grievance alleging that this was a violation of the parties' collective-bargaining agreement. Marcum viewed this stockpile work as a "mixed practice"—i.e., work that could be performed by both Dynamic union employees and outside employees. The Union claimed this work should have been performed only by Dynamic bargaining unit employees, not by a mix of Dynamic and other employees. When Marcum arrived at Coal Mountain in late January 2010, he had significantly increased the number of stockpiles, each devoted to a different grade of coal, and this increased the work related to maintaining and working with the stockpiles.

The grievance was processed through the steps of the grievance procedure and, unresolved, submitted to arbitration before Arbitrator Lynn Wagner. On June 27, 2010, Arbitrator Wagner ruled and granted the Union's grievance. Wagner's award stated, in part, that the Employer

> shall immediately cease and desist from contracting out the processing of coal mined by the Employer from the Coal Mountain surface mine, to any contractor corporation or other entity including, without limitation, any such corporation or entity owned by Mechel.

The arbitration decision identified Stewart as the Dynamic employee who went to Clary to report the contract violation that prompted the grievance.

Dynamic filed suit in federal court to vacate the arbitrator's award, In late August 2010, during a meeting between Tom Lusk and the Union, Lusk told the Union that Dynamic would implement this portion of the arbitrator's award and only assign Dynamic employees perform the disputed work.

According to Marcum (and neither the General Counsel nor the Union disputes it) as a result of this agreement, additional Dynamic employees were hired to work in the stockpile areas. However, in Marcum's view the stockpile work was properly bid out as a stockpile loader position, grade 3, less skilled and less highly paid than Stewart's coal loader position. The grade 5 coal loader was eliminated from the stockpiles. This resulted in a "realignment" as Marcum put out bids for grade 3 Dynamic stockpile loaders—less skilled than Stewart's grade 5 coal loader position—to take over the stockpile work previously done by a combination of Dynamic employees and outside employees.

In effect, in Marcum's view, Stewart had been overpaid to work in the stockpile. With that source of work for a coal loader eliminated, Dynamic shifted its employees to cover the stockpile work. This resulted in the elimination of a grade 5 coal loader position on the day shift. Stewart was "realigned" to the night shift, in effect, forced back into the pit and off the stockpiles.

Union Representative Clary told Stewart about the realignment on the evening of Wednesday, September 8. The next morning, Stewart was waiting in the parking lot for work instructions before his shift began with coemployees, including Darren Kenneda. Their supervisor Randy Maynard approached in his car as he typically did to give them work instructions for the day. Stewart asked what was going on with the switch to the night shift. Maynard told him "you got what you wanted." Maynard also said something to the effect of "you should have known that was going to happen." Kennard recalled Maynard telling Stewart to "be careful what he asked for, because he might get it."

A couple of days later, Maynard approached Stewart near the beginning of his shift. Stewart asked him if anything had changed with regard to the move to second shift. Maynard said no, and then said that Stewart "should have know[n]" that he "was going to be realigned because [his] name was on the grievance." Maynard told Stewart to talk to Marcum and see if something could be worked out to permit him to stay on the day shift.[31]

Analysis

The General Counsel contends that Maynard's comments to Stewart constitute an implied threat: the suggestion that his transfer to the evening shift was retaliation for his recognized involvement in the stockpile grievance.

Of course, it is not alleged that Stewart's "realignment" was retaliatory. I accept that it followed as a nondiscriminatory consequence of the decision by the employer in August to have only Dynamic employees on the stockpiles. That decision was, of course, one that the employer came to only some months after, and presumably as a consequence, of the Union's pursuit of this end in the grievance-arbitration procedure. Thus, as the Respondent stresses, comments linking the realignment to the union's grievance are accurate. There is, no doubt, an incongruity to conceding that the realignment was the lawful reaction to the union's grievance but contending it is unlawful for a supervisor to say it.

I accept that Stewart's realignment was nondiscriminatory, and that—by themselves—comments such as those made September 9 by Maynard that "you should have known what was going to happen," might tend simply to point out that that realignment was a logical (and nondiscriminatory) consequence of the union winning its grievance. However, the comments by Maynard a couple of days later drew an express link between Stewart's personal involvement in the grievance and the consequence of his realignment. Comments to the effect that his realignment occurred "because [his] name was on the grievance" explicitly draw that link and reasonably lead to the inference of linkage based on less blatant comments such as "you got what you wanted" and "you should have known what was going to happen." Although the employer acted lawfully in realigning Stewart as a consequence of the Union's grievance, it would not have been lawful to realign Stewart because of his recognized and noted involvement in the grievance. That would be unlawful retaliation. And by the same token, it is an unlawful threatening and coercive comment for an employer representative to tell or imply to an

[31]Randy Maynard testified and denied having conversations with Stewart about transfer to the evening shift. Maynard's testimony was short, and there was nothing in his demeanor that troubled me. However, I found Stewart and Kenneda to be credible in demeanor, and I had longer to observe them than I did Maynard. But most importantly, their stories corroborated one another. Moreover, Stewart's account is backed up by the contemporaneous notes he took of the incidents. My best judgment is that the notes were not fabrications. The weight of corroboration convinces me that Stewart and Kenneda should be credited.

employee that his participation in a grievance was the reason he was being subjected to a transfer. That is what Maynard did, and, whether the comments were true or not, such comments reasonably tend to interfere with the free exercise of employee rights.

B. Allegations relating to vacation scheduling (paragraphs 7 and 12))

Before the representation election and for a month or so afterwards, Justice Highwall used a vacation scheduling arrangement that provided an informal way for employees to schedule and take off work for vacation. For the most part, it was not coordinated with the production schedule or demands of Dynamic. There was minimal to no use of written forms. Employees would "just go to [maintenance foreman] Dave Street and request the days off, a vacation, or days off that we needed. And based on the—if anybody else was off or not, he—90% of the time he'd approve it."

A calendar on the wall at the maintenance trailer was used to keep track of scheduled vacations. Most times, Street and the employee would look at the calendar together to make sure there was not others (or too many others) seeking those days off. Street would usually make his determination on the spot. If an employee's request would leave enough mechanics working, it was routinely approved by Street. In most cases, for "popular" holidays, the small Justice Highwall workforce worked out among themselves who would seek vacation. This obviated the need for Street to deny requests.[32]

In the months after the representation election, several changes were introduced to the vacation scheduling procedure. In the most general sense, the change involved the coordination of Justice Highwall vacation requests with the requests from Dynamic employees. While under the old system, a vacation request could be denied if necessary to have enough Justice Highwall employees working at the requested time, the new system looked to percentages of employees taking off work across the Dynamic workforce. According to the Dynamic Energy vacation request forms that Justice Highwall employees were now required to submit, there was a "15% rule," presumably a maximum number of Dynamic and Justice Highwall employees allowed on vacation at one time. Under the new system employees seeking vacation were required to submit written request forms in advance. The maintenance supervisor turned the forms over to Marcum for approval or denial of the vacation request. Although there were several iterations of the change, by the end of June 2010, the Justice Highwall employees were using the same forms to request vacation that were used by Dynamic employees. By December 2010, they were filling out a Mechel Bluestone vacation request form. Further changes, implemented at some point in 2010 or early 2011, and referenced by Marcum, included approximately 47 days, mostly Sundays, on which Justice Highwall employees were not permitted to take vacation. Marcum agreed that was a change from the previous system.

[32]The Respondent contends (R. Br. at 9, 21) that one witness, Billy Hatfield, described having to submit written vacation request forms prior to the representation election. This is not an accurate reading of the record. The forms Hatfield described were filled out at the time a vacation was actually taken, and turned into the office for pay purposes. These forms were not filled out as part of the request to take a vacation, which, by all evidence was handled orally with the maintenance supervisor.

One Justice Highwall employee, Delbert Roberts, testified that he took a vacation for the last three years during the week of the Thanksgiving holiday, visiting a timeshare that required a commitment a year in advance. In November or December 2009, just after returning from his vacation, he requested the Thanksgiving 2010 vacation. He wrote it on the calendar and, because he took this every year, his supervisor did not have to say anything to him about it. Six months later, in June of 2010, Maintenance Manager David Houk, who worked in the maintenance trailer, notified Roberts that he would have to apply in writing for the vacation, and Roberts was given a Dynamic vacation request form to complete.

Roberts' written request was denied. He went to Marcum and explained the situation, "that I had to have this approved a year in advance." Marcum said "he would go ahead and approve it for that year[,] [b]ut I needed to talk to him about changing my week, because the holiday weeks are blacked out. You can't take your vacation during the holiday weeks."

Justice Highwall employee Bradley Browning testified to an informal process of orally requesting vacation from foreman Dave Street as of May 2010. If Street approved a vacation request, Browning would take responsibility for writing it on the office wall calendar so that others could see it. Browning followed this process in May 2010, and requested days off around the July 4 holiday. Street told him "it wouldn't be no problem, ain't nobody requested those days already." Subsequently, in mid-June, Browning was told he would have to re-request the days off in writing using a Dynamic vacation request form. Browning submitted the form and the new request was disapproved the next day. He did not receive the requested vacation.

Union Negotiator Jerry Massie has been involved with collective-bargaining negotiations with Justice Highwall, which began in June 2010, after the Union's certification as the bargaining representative. Justice has not proposed changes to the vacation scheduling policy in negotiations or ever notified the Union of changes to that policy.

Marcum testified that after he took over at Coal Mountain, supervisors, such as Street were supposed to bring vacation requests to Marcum, not approve them by themselves. However, Marcum conceded that Street, for instance, "may have approved vacations" himself.

According to Marcum, when he arrived at Coal Mountain, he asked a lot of questions and immediately recognized problems in the way the employees were managed. "I gave the order to pre-schedule vacations . . . with the Dynamic group and vacation in the other entities, Justice Highwall and M&P." Marcum also testified that, consistent with the employees' testimony that he heard at the hearing, employees always needed advance approval to take vacation "but it was never in documented form." Marcum explained that after his arrival "I kept insisting . . . and it finally got into a recorded document or form." Looking through the vacation forms, the earliest one he saw was from June 2010, but Marcum had "immediately asked for that to be implemented." Marcum attributed this to the hiring of Tim Runyon, who replaced Dave Street in late May 2010: "I hired Tim Runyon after Dave Street left and Tim Runyon helped me to implement that process of the documentation."

More recently, in 2011 or later in 2010, Marcum described further changes to the vacation scheduling rules that include a significant number, perhaps 47 "blackout" days on which employees are barred from taking vacation days.

Analysis

The complaint alleges that in June 2010, after the Union's April 23, 2010 election as bargaining representative, Justice Highwall unlawfully changed its policy with respect to scheduling and granting of employee vacation requests, without providing the Union with notice and an opportunity to bargain. The government alleges that this change violated Section 8(a)(5) of the Act and, derivatively, Section 8(a)(1) of the Act.[33]

The complaint also alleges that the change in vacation scheduling and approval procedure, and the attendant rescission of some employees' previously approved vacations, was unlawfully motivated retaliation for the employees' selection of union representation. The government alleges that the change in vacation policy and rescission of previously approved vacations violated Section 8(a)(3) of the Act, and derivatively, Section 8(a)(1) of the Act.

8(a)(5) unilateral change

An employer violates Section 8(a)(5) of the Act if it makes a material unilateral change during the course of a collective-bargaining relationship on matters that are a mandatory subject of bargaining. "Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy." *NLRB v. Katz*, 369 U.S. 736, 747 (1962). "The vice involved in [a unilateral change] is that the employer has changed the existing conditions of employment. It is this change which is prohibited and which forms the basis of the unfair labor practice charge." *Daily News of Los Angeles*, 315 NLRB 1236, 1237 (1994) (bracketing added) (quoting *NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93, 98 (5th Cir. 1970)), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997).

The general rule is that during negotiations for a collective-bargaining agreement an employer may not make unilateral changes in mandatory subjects of bargaining without first bargaining to a valid impasse. While negotiations for a collective-bargaining agreement are ongoing "an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole." *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) (footnote omitted), enfd. mem. 15 F.3d 1087 (9th Cir. 1087 (9th Cir. 1994).

"There is no doubt that an employer's obligation under Section 8(a)(5) of the Act to refrain from making unilateral changes in working conditions commences at the time of an apparent ballot victory for a labor organization." *Consolidation Printers, Inc.*, 305 NLRB 1061, 1067 (1992); *Tri–Tech Services, Inc.*, 340 NLRB 894, 895 (2003).

Employee vacations scheduling is a mandatory subject of bargaining that falls squarely within the ambit of the employer's duty to bargain. *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 636 (2001); *Blue Circle Cement Co.*, 319 NLRB 954, 960 (1995), enfd. in relevant part, 106 F.3d 413 (10th Cir. 1997) (unpublished opinion).

[33]An employer's violation of Sec. 8(a)(5) of the Act is a derivative violation of Sec. 8(a)(1) of the Act. *Tennessee Coach Co.*, 115 NLRB 677, 679, enfd. 237 F.2d 907 (6th Cir. 1956). See *ABF Freight System*, 325 NLRB 546 fn. 3 (1998).

The record is clear that before May or June 2010, Justice Highwall employees enjoyed an informal vacation scheduling system that was not coordinated with Dynamic employee vacation scheduling, that was arranged by talking with coworkers to avoid conflicts, and that involved advance oral approval from the mine manager. In May or June, this changed and over the course of 2010 further innovations were undertaken in the process. The changes included, a requirement that a written request for approval be submitted to the mine manager, who then sent it to Marcum for ultimate approval or disapproval. It required requests from Justice Highwall employees to be considered in conjunction with vacation requests from Dynamic employees. It included discouraging employees from taking vacations around holidays and, in time, prohibiting it, as those became part of the "blackout" period described by Marcum for which vacations would not be approved.

From the point in time that the Union won the election on April 23, 2010, the Respondent was obligated to notify the Union and provide an opportunity to bargain over any changes it desired to make in vacation scheduling. Moreover, since the parties were beginning negotiations for a collective-bargaining agreement, absent the agreement of the Union, the employer was obligated to refrain from implementing changes to its vacation scheduling (or any other mandatory subject of bargaining) without reaching an overall bargaining impasse.

It is undisputed that none of the changes in the vacation scheduling process described by employees, or subsequently late in 2010 or early 2011, as described by Marcum, were agreed to by the Union, or even raised in collective bargaining. These unilateral changes are violations of the statutory duty to bargain.[34]

8(a)(3) discrimination

The General Counsel alleges that the unilateral changes implemented by the Respondent to the vacation scheduling, as well as the rescission of already approved vacations, were motivated by the employees' union and concerted activities and intended to discourage the same. The complaint maintains that these changes constituted antiunion discrimination violative of Section 8(a)(3) of the Act.

As with the termination of the M&P employees, the issue is one analyzed under the *Wright Line* framework. The General Counsel's evidence and argument on this claim is limited to the contention that that the Respondent's antiunion animus, as demonstrated through its other unfair labor practices, supports the conclusion that the vacation schedule changes were unlawfully motivated. Even assuming, arguendo, that is an adequate prima facie case, I think that Marcum's testimony about his desire to make changes to the vacation scheduling procedure demonstrates that the Respondent would have made these changes even in the absence of the employees' union activity. I will dismiss this allegation.

[34]The Respondent suggests that the changes reflected more consistent enforcement of rules that Marcum sought and, at least in theory, implemented prior to the election, soon after his arrival. However, even assuming, arguendo, this is true, a more stringent and consistent enforcement of laxly enforced rules represents a change in terms and conditions of employment over which an employer has an obligation to offer to bargain. *Vanguard Fire & Supply Co.*, 345 NLRB 1016, 1017 (2005), enfd. 468 F.2d 952 (6th Cir. 2006); *Hyatt Regency Memphis*, 296 NLRB 259, 263–264 (1989), enfd. 939 F.2d 361 (6th Cir. 1991).

C. Assignment of Dynamic bargaining unit work to nonunit employees (paragraph 13)

At Coal Mountain, the coal mined from the surface mine is transported to the stockpiles by truck. Each stockpile is composed of coal of different qualities (with various chemical compositions) of coal. The stockpiles must be maintained by employees. The coal in the stockpiles is processed before being shipped off the property to customers or before being sent to the preparation plant on site. As part of this processing, the coal in the stockpiles must be cleaned, screened by running the coal through crusher, and the piles pushed up with dozers. It must be loaded into trucks to go to the prep plant or into tractor-trailers to be shipped off the property.

Dynamic has maintained coal stockpiles at Coal Mountain since approximately the fall of 2008. Since Marcum arrived in late January 2011, production of coal has significantly increased and the number of stockpiles used to store coal has increased as well. When Marcum arrived there were three stockpiles, each at different elevations on the coal mountain facility. As Marcum explained, the increase in stockpiles under his tenure was due in part to increased production, but also to his determination to stop "co-mingling" different grades of coal which "contaminated" expensive an inexpensive coal. Marcum estimated that as of March 2011, there were approximately 60 stockpiles at Coal Mountain.

Lusk testified that when Dynamic first recognized the Union in 2004, the intent was to "focus the Dynamic Energy group on the core business of producing coal by which Lusk meant "the actual production of the coal." According to Lusk, Dynamic "was charged with the business of stripping the overburden, of preparing the coal for market or transporting it to a stock area for processing at a prep plant." But "all of the support and ancillary services would be contracted out either [to] independent [companies] or [to] wholly owned subsidiaries." Lusk testified that this arrangement was not based on an exception to the NBCW Agreement, but rather, represents the type of work "usually and customarily performed" by the Union and usually and customarily performed by ancillary operations.

According to the former production foreman and current superintendent James Sloan, the use of non-Dynamic employees to perform stockpile work began around the fall of 2008 when the first stockpiles were created from Dynamic's mining. According to Sloan, a mix of union and nonunion employees performed the stockpile work, including the screening, crushing, and pushing up of coal. Sloan testified that this had been the case for 2 ½ years. Marcum testified that it was the case as of when he arrived at the facility in late January 2010.

Sloan's and Marcum's testimony was contradicted by Dynamic employee Gary Stewart, who worked on the stockpiles for many years. He testified that before Marcum came to Coal Mountain, in late January 2010, the union employees of Dynamic "always worked the stockpiles. Then when Mr. Marcum come, he put contractors out there to help us, because we was growing, the stockpiles was growing." According to Stewart, before Marcum, Stewart worked the stockpiles, usually alone, and if he needed help Dynamic employees would be sent to assist. But under Marcum's watch, "the M&P boys" and Justice Highwall nonunion employees began to be brought in to help work the stockpiles. This prompted Stewart to have the Union file the grievance that resulted in the Wagner Arbitration. M&P employee Phillip Coleman testified that after Marcum came to Coal Mountain "we was able to do more things" which resulted in Dynamic employees filing "grievances on us." This included performing road work, pushing coal, screening coal, and working on the "upper level" stockpile where nonunion employees "would normally stay away from." Coleman testified that before Marcum came, he done little or no pushing of coal on stockpiles. That changed with Marcum's arrival.

The Union maintains that as coal processing work, the stockpile work was "classified work" to be performed, pursuant to the labor agreement, only by bargaining unit employees.[35]

The Employer contends that, since the establishment of Dynamic at Coal Mountain, and since the recognition of the Union in 2004, there has been a "mixed practice at best" as to the assignment of stockpile work. On the higher elevation stockpile, only Dynamic employees could be assigned. On the other two main stockpile areas, the employer contends it was free under the contract and longtime practice to assign nonunit employees to work there, and regularly did so, although a Dynamic employee operating a coal loader (usually Stewart) was often sent in to make sure the nonunit employees kept up with the work requirements. The labor agreement provides that recognition of the Union does not "change the rules or practices of the industry pertaining to management" and will not involve an "intrusion upon the rights of management as heretofore practiced and understood." (GC Exh. 12 (at 3)).

In February 2010 the Union filed a grievance over the Respondent's assignment of non-Dynamic employees to perform stockpile work. The body of the grievance stated:

> Management is in violation of Article 1A section (a) and any other article that may apply, of the NBCWA of 2007. On or about 2/21/2010, unclassified personnel were observed working at a coal stockpile that had been in the past under union work jurisdiction. As a remedy we ask that any union member affected by this action be made whole, and that the company cease and desist from this practice.

The grievance was not resolved in the grievance procedure and was submitted to arbitration pursuant to the labor agreement's dispute resolution procedures.

The Union's view carried the day with the arbitrator. In an award issued June 27, 2010, Arbitrator Wagner sustained the Union's grievance and issued a "cease and desist" remedy as requested by the Union. The award explicitly requires that the employer stop contracting out this coal processing work. The award states that the Employer:

> Shall immediately cease and desist from contracting out the processing of coal, mined by the Employer from the Coal Mountain surface mine, to any contractor corporation or other entity including, without limitation, any such corporation or entity owned by Mechel.

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[35]The bargaining unit work for Dynamic employees is defined by the parties' collective-bargaining agreement. The Agreement describes (GC Exh. 12 at 3) the work jurisdiction as follows:

> The production of coal, including removal of overburden and coal waste, preparation, processing and cleaning of coal and transportation of coal (except by waterway or rail not owned by Employer), repair and maintenance work normally performed at the mine site or at a central shop of the Employer and maintenance of gob piles and mine roads, and work of the type customarily related to all of the above shall be performed by classified Employees of the Employer covered by and in accordance with the terms of this Agreement. Contracting, contracting leasing and subleasing, and construction work, as defined herein, will be conducted in accordance with the provisions of this Article.

Moreover, the award states that

> The Employer . . . shall immediately compensate (i.e. wages and benefits) any [unit] employees for work time lost due to contracting out the processing of coal mined by the Employer to one or more contractor corporations on or about February 2, 2010, in violation of the [collective-bargaining agreement] as complained of in the Grievance.

The Employer initially failed to comply with the award. The record is clear that after June 27, until late August, Justice Highwall employees continued to perform stockpile work that the arbitrator had concluded belonged to the Dynamic bargaining unit. Dynamic filed a suit in federal court to vacate the arbitrator's award. A late August meeting between Lusk and the International Union leadership resulted in the implementation of the portion of the Wagner award and remedy dealing with the performance of stockpile work. Henceforth that work was performed by Dynamic employees and six additional Dynamic employees were hired as a result. While it maintains the suit to vacate, the Respondent represents in its brief that its suit to vacate does not challenge the arbitrator's ruling on the work jurisdiction issues. The Respondent states (R. Br. at 25.):

> [T]he Company has abided by the Arbitrator's decision to the extent that it covers the same allegations of General Counsel's complaint. The Company is contesting the Arbitrator's decision only insofar as that decision travels beyond the issues submitted to the Arbitrator and decides other issues including the ownership of the coal prep plant on the Coal Mountain site and related issues (the Company has an action pending in federal court to vacate the Arbitrator's decision to the extent that it decides these extraneous matters).

Analysis

The complaint alleges that from June 27, 2010, and continuing into August 2010, Dynamic assigned bargaining unit work to individuals not employed in the Dynamic bargaining unit. The complaint alleges that such assignments are a mandatory subject of bargaining and were undertaken without prior notice to the Union or providing an opportunity to bargain. The complaint alleges that this failure to bargain is a violation of Section 8(a)(5) of the Act (and, derivatively, Section 8(a)(1)).

It is useful to point out at the outset that, while the alleged complaint violation does not assert an unlawful modification of a labor agreement, the General Counsel's theory and argument is explicitly rooted in and dependent upon the claim that the Respondent's action "constitutes a breach of contract" and "an abrogation of a segment of the work jurisdiction provision of the applicable agreement." (GC Br. at 45).

The General Counsel and the Union rely on the wording of the "work jurisdiction" provision of the labor agreement and contend that the disputed stockpile work falls within the meaning of the work involved with the "production of coal" that is assigned by the contract for unit employees. According to the General Counsel, the employer's post-June 27 assignment of stockpile work to Justice Highwall employees is "directly contrary to the decision" of Arbitrator Wagner. (See Tr. 28–29).

The Employer maintains, as it maintained to Arbitrator Wagner, that labor agreement, interpreted in the context of the parties' practice, permits it to assign stockpile work to non-Dynamic employees, as it claims to have been doing for years. Indeed, the labor agreement

provides that recognition of the Union does not "change the rules or practices of the industry pertaining to management" and will not involve an "intrusion upon the rights of management as heretofore practiced and understood." (GC Exh. 12 (at 3)). I do not accept the General Counsel and Union's position that the Respondent's "mixed practice" argument amounts to an "obfuscat[ion" and that the Respondent "do[es] not have a viable contract provision to rely upon for purpose of justifying their conduct." (GC Br. at 45). Even without the explicit "practice" language in this labor agreement, It is a fundamental tenet of federal labor contract interpretation that—absent evidence excluding practice from consideration—the practices of parties to a contract may be considered in defining and interpreting that contract.[36]

Tellingly, while the Respondent defends on contractual grounds, neither in briefs nor at trial did the General Counsel or the Union ever advance, or even mention, that the resolution of this issue turns on the question of whether the contract (or other evidence) demonstrates a clear and unambiguous waiver by the Union of the statutory right to bargain. See, *Provena St. Joseph Med. Center*, 350 NLRB 808, 811 (2007) ("in decisions too numerous to cite the Board has applied the clear and unmistakable waiver analysis to all cases arising under Section 8(a)(5) where an employer has asserted that a general management-rights provision authorizes it to act unilaterally with respect to a particular term and condition of employment") (footnote omitted). The General Counsel does not make that argument.

This is understandable. The dispute here is not one in which the Respondent is claiming that the Union "waived" statutory rights. The Employer is not claiming a right—rooted in contract, or elsewhere, to act "unilaterally." In fact, the claim advanced by the General Counsel is not, really, one alleging a "unilateral change." There is no dispute but that for at least five months before June 27, 2010, and much longer than that if the Respondent's witness is believed, Dynamic routinely assigned stockpile work to nonunit employees, who worked alongside Dynamic employees who were also performing stockpile work. Thus, there was no unilateral change in terms and conditions on or about June 27, 2010. Rather, there was a continuation of a practice begun either in February 2010, or, according to the Respondent, in 2008. However, the complaint alleges that the violation began June 27, 2010, because that is the date of the arbitrator's decision that the employer's assignment practice violated the labor agreement. This further demonstrates the fact that the General Counsel's affirmative case—and not just the Respondent's defense—is rooted in the contract.

Thus, the dispute, as framed by the General Counsel, the Union, and the Employer, is over what the union and employer agreed to when they became signatories to the labor agreement. In other words, this is a contractual dispute.

As recently reiterated by the Board in *Picini Flooring*, 355 NLRB No. 123, slip op. at 2 (2010) (footnote omitted):

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[36] *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 579–583 (1960) ("The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it"). See, *Conrail v. Railway Labor Executives Ass'n*, 491 U.S. 299 (1989) ("Neither party relies on any express provision of the agreement; indeed, the agreement is not part of the record before us. As the parties acknowledge, however, collective-bargaining agreements may include implied, as well as express, terms. Furthermore, it is well established that the parties' 'practice, usage and custom' is of significance in interpreting their agreement"). (citation omitted).

> The Board has repeatedly held that "[w]here . . . the dispute is solely one of contract interpretation, and there is no evidence of animus, bad faith, or an intent to undermine the union, we will not seek to determine which of two equally plausible contract interpretations is correct." *Atwood & Morrill*, 289 NLRB 794, 795 (1988). In such cases, the Board will not find an 8(a)(5) violation, leaving the parties to resolve their contract dispute in an appropriate alternative forum.
>
> The Board holds that
>
> when an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it, the Board will not enter the dispute to serve the function of arbitrator in determining which party's interpretation is correct.

NCR Corp., 271 NLRB 1212, 123 (1984), quoted in *Picini Flooring*, supra; *Phelps Dodge Magnet Wire Corp.*, 346 NLRB 949 (2006).[37]

Application of this test governs this case. The Board is being asked to determine whether a particular function related to the coal production process was agreed by the parties to be work that only unit employees would perform. Each party relies upon its own plausible interpretation of the parties' contractual agreements and practices. This is a work assignment dispute regarding a condition of employment that was created and defined by what the parties' intended and agreed to when they entered into their contract. This is, in short, a case in which the Board should allow the parties, as they have done, to resolve this contractual dispute in another forum.

Instructive in this regard is the dissent's observations in *Bath Iron Works Corp.*, 345 NLRB 499, 507 (2005), enfd. 475 F.3d 14 (1st Cir. 2007), that most "sound arguable basis cases" (like the ones I have cited, supra, and like the instant case)

> do not involve contract provisions that purport to give the employer a broad right to act unilaterally with respect to a mandatory subject of bargaining—and thus do not obviously implicate the policy concerns that inform the Board's waiver doctrine. . . . As language in the "sound arguable basis" decisions strongly suggests, these cases are best understood as instances in which the Board effectively defers to another forum (i.e., the Federal courts, pursuant to their jurisdiction over disputes arising under collective-bargaining agreements even though deferral to arbitration was not, or could not be, raised as a defense in the case.[38]

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[37]I note that while there are certainly findings of animus with regard to, inter alia, the discharge of the M&P employees, I do not find any animus, bad faith, or intent to undermine the Union is part of Dynamic's dispute with the Union over the assignment of work.

[38]Although written as part of a dissent, the point is intended to describe the appropriate ambit—narrower than the majority's view—of the application of the "sound arguable basis test" in Section 8(a)(5) litigation. While the majority in *Bath Iron Works* advanced a broader view—applying the test to defenses based on broader claims of a contractual right to unilateral action, the majority would not disagree that narrower contractual disputes, such as the instant case, should be governed by this test.

This is the case here. As the General Counsel points out, the Respondent did not plead or raise a defense of deferral to the arbitrator's award. But deferral to the award or not, this is a contractual dispute that should be, and for the most part has been, resolved by the parties. Notably, as discussed, above, the General Counsel recognizes that "[f]ollowing the issuance of th[e arbitration] decision and directly contrary to the decision, Respondents continued to use the employees of Justice Highwall to perform the processing of coal, as well as other employees, to perform the processing of coal, including performing work in coal stockpiles." (Tr. 28–29). But the appropriate response to the flouting of an arbitration award is enforcement proceedings, not an unfair labor practice case. See, *Shaw's Supermarket*, 339 NLRB 871, 871 (2003) ("we agree that the Board's processes should not be used as a substitute for district court enforcement of an arbitration award under Section 301 of the Act"); 336 NLRB 1048, 1049 (2001) ("judicial enforcement of the arbitration award remains a viable and, in fact, the preferred remedy"); *Malrite of Wisconsin, Inc.*, 198 NLRB 241, 242 (1972), remanded on other grounds, 494 F.2d 1136 (D.C. Cir. 1974).[39]

I will recommend dismissal of this allegation of the complaint.[40]

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[39]It is notable, but not decisive, that the assignment of work that is the subject of the General Counsel's allegations (assignments from June 27 through August 2010) appears to be identical to, and therefore, prohibited directly by Arbitrator Wagner's award. That award—issued June 27—is a prospective "cease and desist" order. *Massachusetts Nurses Ass'n v. North Adams Regional Hospital*, 467 F.3d 27 31 (1st Cir. 2006) ("the very nature of cease-and-desist [arbitration] orders is to provide prospective relief"). It explicitly requires that the employer stop contracting out this coal processing work. This "cease and desist" award appears to render factually identical post-June 27 assignment of stockpile work a square violation of the award. Federal courts have recognized that a prospective cease and desist award can be enforced directly in court to bar factually identical conduct by the employer. See, *OCAW v. Ethyl Corp.,* 644 F.2d 1044 (5th Cir. 1981). Any ambiguity over the scope or meaning of the arbitrator's award would be a matter for remand to the arbitrator. *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *Bell Aerospace Co. Division of Textron v. Local 516, UAW*, 500 F.2d 921, 923 (2d Cir. 1974); *United Mine Workers v. Consolidation Coal Co.*, 666 F.2d 806 (3d Cir. 1981); *United Paperworkers Local 1206 v. Georgia Pacific*, 798 F.2d 172 (6th Cir. 1986).

[40]I note that as advanced by the General Counsel, this allegation is limited to coal processing *stockpile* work that Dynamic assigned to nonunit employees. This was the position of the General Counsel in his opening statement at trial (Tr. 28–29), and in his posthearing brief GC Br. at 25–26, 45). Subsequently in response to an order show cause why the Board should not defer to Arbitrator Wagner's award, counsel for the General Counsel contended (GC Response to Order to Show Cause at 3) that evidence at the hearing demonstrates that non-Dynamic employees performed "not only work in the stockpiles, but other types of work as well," some of which "arguably falls under the jurisdiction of the Dynamic bargaining unit."

Whether or not the evidence "arguably" shows that, the General Counsel has not argued it. The suggestion that other contracted work "arguably" violates the labor agreement is not specific enough to count as an argument. I recognize that the Union, in its response to the order to show cause, identified a range of noncoal processing contracting-out incidents in the record that it claims violates the contract, and therefore, allegedly the Act as well, but the Union is not empowered to advance violations beyond those alleged by the General Counsel. *Planned Building Services, Inc.*, 330 NLRB 791, 793 fn. 13 (2000) ("A charging party may not expand the scope of the complaint without the consent of the General Counsel").

In any event, the analysis is not affected by contention that additional work other than stockpile work is part of this claim. The Board need not resolve such contractual disputes.

CONCLUSIONS OF LAW

1. The Respondents Dynamic Energy, Inc., and M&P Services, Inc., and Justice Highwall Mining, Inc. (hereinafter referred to collectively as the Respondent) are a single employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party United Mine Workers of America, AFL–CIO (Union) is a labor organization with the meaning of Section 2(5) of the Act.

3. At all material times the Union has been the designated exclusive collective-bargaining representative of the following bargaining unit of Respondent's Dynamic Energy employees, as described in the collective-bargaining agreement to which the Union and Dynamic Energy are party:

> The production of coal, including removal of overburden and coal waste, preparation, processing and cleaning of coal and transportation of coal (except by waterway or rail not owned by Employer), repair and maintenance work normally performed at the mine site or at a central shop of the Employer and maintenance of gob piles and mine roads, and work of the type customarily related to all of the above shall be performed by classified Employees of the Employer covered by and in accordance with the terms of this Agreement. Contracting, contracting leasing and subleasing, and construction work, as defined herein, will be conducted in accordance with the provisions of this Article.

4. At all material times the Union has been the designated exclusive collective-bargaining representative of the following bargaining unit of Respondent's Justice Highwall Mining employees:

> All mechanics, mechanics helpers, welders, and equipment operators employed at the Employer's Dynamic Energy Coal Mountain W.V. Complex, but excluding all office clerical, guards, managerial employees and supervisors as defined in the Act.

5. On or about March 12, 2010, the Respondent violated Section 8(a)(1) and (3) of the Act by discharging employees Stephen Paynter, Nathan Brown, Phillip Coleman, Jeremy Blankenship, Shawn Sheppard, and Christopher Champagne because they engaged in activities in support of union representation and to discourage other employees from engaging in these and other protected activities.

6. On or about, May 12, 2010, the Respondent violated Section 8(a)(1) of the Act by interrogating an employee about his union sympathies, soliciting employees to sign and to solicit other employee signatures for a decertification petition, and promising an employee higher wages and additional tools if he assisted in gathering employee signatures for a decertification petition.

7. In or about October 2010, the Respondent violated Section 8(a)(1) of the Act by telling an employee it wanted the employees to quit impliedly because of the employees' Union activities.

8. On or about September 9 and 11, 2010, the Respondent violated Section 8(a)(1) of the Act by stating or implying that an employee's shift transfer was retaliation for his protected grievance-related activities.

9. Since on or about June 2010, the Respondent has violated Section (a)(1) and (5) of the Act by unilaterally changing the vacation scheduling policy for Justice Highwall bargaining unit employees without providing notice to the Union or an opportunity to bargain.

10. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having unlawfully discharged employees Stephen Paynter, Nathan Brown, Phillip Coleman, Jeremy Blankenship, Shawn Sheppard, and Christopher Champagne as of March 12, 2010, must offer these employees full reinstatement to the position each occupied prior to the discharge, or to an equivalent position, should the prior position not exist, without prejudice to their seniority or any other rights or privileges previously enjoyed.

The Respondent shall make Paynter, Brown, Coleman, Blankenship, Sheppard, and Champagne whole for any loss of earnings and other benefits suffered as a result of their unlawful discharge. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987), compounded daily as provided in *Kentucky River Medical* Center, 356 NLRB No. 8 (2010). Respondent shall remove from its files, including the unlawfully discharged employees' personnel files, any reference to their discharge, and shall thereafter notify the unlawfully discharged employees in writing that this has been done and that the discharge will not be used against them in any way.

The Respondent having unlawfully changed its vacation scheduling policy for Justice Highwall employees shall restore the policy in effect at the time of the April 23, 2010 representation election. Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, the Respondent shall notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of the Justice Highwall unit employees.

The Respondent shall further be ordered to refrain from in any like or related manner abridging any of the rights guaranteed to employees by Section 7 of the Act.

The Respondent shall post an appropriate informational notice, as described in the attached Appendix. This notice shall be posted in the Employer's facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its

contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. When the notice is issued to the Employer, it shall sign it or otherwise notify Region 9 of the Board what action it will take with respect to this decision.

The Gissel bargaining order request

In view of the severity of the unfair labor practices directed against the M&P unit, I agree with the General Counsel's argument that a bargaining order of the type authorized in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) is warranted. Pursuant to *Gissel*, the Board will issue a remedial bargaining order, absent an election, in two categories of case. Category I cases are "exceptional" cases, marked by "outrageous and "pervasive" unfair labor practices the coercive effects of which cannot be erased by traditional remedies, thus rendering a fair and reliable election impossible. *Gissel*, 395 U.S. at 613–614. In category I cases, the bargaining order is appropriate "without need of inquiry into [the union's] majority status on the basis of cards or otherwise." Id. Category II cases are less extraordinary cases marked by a lesser showing of employer misconduct, but which still has the tendency to undermine majority strength and impede the election process. 395 U.S. at 614. In category II cases, a bargaining order is appropriate were there is a showing that at one point the union had a majority but that in light of the unfair labor practices the possibility of erasing the effects of the unfair labor practices and ensuring a fair election by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order. 395 U.S. at 614–615.

I think that under the circumstances the Employer's conduct in unlawfully discharging most of the M&P unit is sufficiently outrageous to qualify as a category 1 case under *Gissel*. In any event, a card majority was achieved and even assuming, wrongly, that it is a category 2 case, the circumstances warrant imposition of a *Gissel* order.

In this case, the unit is appropriate and was stipulated to by the parties as part of the election process. By March 11, 100 percent of the eight-person bargaining M&P bargaining unit had signed union authorization cards. Those cards were properly authenticated at the hearing. Thus, as of March 11, 100 percent of the unit had chosen union representation. The Employer, through its highest ranking officials, discharged of 75 percent of an eight person bargaining unit within 24 hours of learning that the employees' union activities were about to come to a head.

Essentially, the Employer's response to the union organizing activity was to dismantle the unit. It is no surprise that discharges are considered "hallmark" violations, "which are highly coercive because of their potentially long-lasting impact." *National Steel Supply, Inc.*, 344 NLRB 973, 976 (2005), enfd. mem 207 Fed. Appx. 9 (2nd Cir. 2006), and citing *NLRB v. Jamaica Towing*, 632 F.2d 208, 212 (2d Cir. 1980). "The discharge of employees because of union activity is one of the most flagrant means by which an employer can hope to dissuade employees from selecting a bargaining representative because no event can have more crippling consequences to the exercise of Section 7 rights than the loss of work." *Mid–East Consolidation Warehouse*, 247 NLRB 552 (1980).

In addition to its severity, the swiftness, and what is more, the casualness of the Employer's reaction carries with it a message that cannot be mistaken by either a bold or a timid employee. Notably, the discharges were personally carried out by the highest ranking management official at Coal Mountain, Marcum, and planned the night before at a meeting with Mechel Bluestone CEO Lusk. "The impact of the violations is heightened by the small size of

the unit and the direct involvement of the Respondent's highest ranking officers." *National Steel Supply*, 344 NLRB at 977; *Consec Security*, 325 NLRB 453, 454–455 (1998), enfd. mem. 185 F.3d 862 (3d Cir. 1999). "With this swift, massive dismantling of the bargaining unit, the Respondent sent its employees the unequivocal message that it was willing to go to extraordinary lengths in order to extinguish the union organizational effort. It is reasonable to infer that such a severe message will have a lasting effect on the unit employees' exercise of their rights to organize." *Consec Security*, 325 at 454. This "is unlawful conduct that 'goes to the very heart of the Act' and is not likely to be forgotten." *Consec*, supra, quoting *NLRB v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941).[41]

In addition, to my mind, the lack of prior warnings or threats or other unfair labor practices by the Employer toward this unit serves to heighten—not diminish—the effect the discharges will have on employees' exercise of Section 7 rights. Through some combination of the lack of importance of the M&P unit to the Coal Mountain operations and the disregard of the Employer for the organizational rights of employees, the Employer has proven itself an employer that "doesn't play." It eliminates. I think that offers of reinstatement and backpay will be cold comfort should M&P employees (whether remaining, reinstated, or newly hired) have to participate in a future rerun election. Any new election would be conducted with the knowledge by the voters that they are, in the words of Marcum, "excess baggage" and that the Employer has proven itself unwilling to tolerate their organizational activities. *National Steel Supply*, 344 NLRB at 977, quoting *Allied General Services*, 329 NLRB 568, 570 (1999) ("Mass discharges leave no doubt as to the response that the employees will reasonably fear from their employer if, after reinstatement, they persist in their support for a union"). Of course, the lack of additional unfair labor practices committed against the two remaining M&P employees is not surprising as the discharge of six of eight prospective unit employees the Employer "had accomplished its short-term objectives[,]" and "there was no further dirty work to be done." *NLRB v. Horizon Air Services*, 761 F.2d 22, 32 (1st Cir. 1985).[42]

Finally, I point out that the fact that all but one of the discharged unit employees found work at other Mechel Bluestone mines—for the most part unionized positions and all with higher pay and better benefits—within a couple of weeks, does not mitigate the need for a bargaining

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[41]Although the Employer left two M&P employees working, the observation of the Board in *Cassis Management Corp.*, 323 NLRB 456, 459 (1997), quoted in *Allied General Services, Inc.*, 329 NLRB 569, 570 (1999), where the entire six-person unit was unlawfully discharged, is pertinent:

> Discharge of an entire bargaining unit is the ultimate retaliation for union activity, the final assault on the employment relationship. It is difficult to conceive of unfair labor practices with more severe consequences for employees or with more lasting effects on the exercise of Section 7 rights.

[42]I recognize that even without a bargaining order, there is the possibility that the Union may have won the April 23, 2010 election, the outcome of which is not yet known. "It is, however, well settled that the Union is entitled to both a bargaining order and a certification of representative in the event the revised tally of ballots shows that it won the election." *General Fabrications Corp.*, 328 NLRB 1114, 1116 fn. 17 (1999); *Concrete Form Walls, Inc.*, 346 NLRB 831, 840 fn. 30 (2006). Even if the preexisting support for a union is such that it can still eke out an election victory after the employer commits unfair labor practices of the magnitude at issue here, that hardly demonstrates that the election was fair or the tally an accurate measure of individual employee free choice.

order *as to the M&P unit.* This is so, even assuming that the individual discriminatees find that, adding in the factor of any increased travel burdens, that their new position is a better one. It is always true that an unlawfully discharged employee hopes the next job is better than the last. Occasionally it happens. But this does not make the next cadre of unit employees (be they reinstated discriminatees, new employees, or survivors of the mass discharges) any less likely to fear the Respondent's proven willingness to retaliate with mass discharges for protected activities. The post-discharge employment fortunes of these discriminatees does not increase the chances that a rerun representation election will fairly measure employee sentiments.

For all these reason, the recommended remedy in this case will include an order that the Respondent bargain with the M&P unit.

The Respondent's obligation to bargain commenced March 12, 2010, when it "embarked on a clear course of unlawful conduct." *Trading Port*, 219 NLRB 298 (1975); *Chosun Daily News*, 303 NLRB 901 (1991).[43]

The request for an order requiring reading of the notice aloud to employees

The General Counsel also seeks a further "special" remedy: it seeks (GC Br. at 47) an order to have a management official read aloud the posted notice to employees on working time or have an agent of the Board read it to employees in the presence of a management official. This remedy often has been imposed by the Board in cases where traditional remedies are inadequate and a bargaining order inappropriate,[44] but not usually in addition to a *Gissel* bargaining order.[45]

In this case, given severe nature of the M&P unfair labor practices, the special remedy of reading the notice aloud would be inadequate as a remedy in the absence of a *Gissel* bargaining order. However, assuming the recommended bargaining order is imposed, the additional imposition of this special remedy is unnecessary. A bargaining order, along with traditional remedies, will serve to best protect the M&P employee sentiments on representation.

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[43]I note that, notwithstanding notice in the complaint that the General Counsel was seeking a *Gissel* order, the Respondent confines its argument (R. Br. at 18 fn. 1) on the appropriateness of a bargaining order to the observation that it is not warranted if the discharges were lawful. In other words, "the Respondent does not challenge the fact that the coercive effects of the alleged unfair labor practices warrant a remedial bargaining order." *Concrete Form Walls, Inc.*, 346 NLRB at 838. This failure to contest the appropriateness of the *Gissel* order as a remedy for unfair labor practices found is, if not a concession, another factor in its favor of its application once the elements of the unfair labor practices are established. Id.

[44]E.g., *Homer D. Bronson Co.*, 349 NLRB 512, 515 (2007), enfd. 273 Fed. Appx. 32 (2d Cir. 2008); *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003), enfd. 400 920, 929, 930 (D.C.Cir. 2005); *High Point Construction*, 342 NLRB 406, 407–408 (2004), enfd. 135 Fed. Appx. 598 (4th Cir. 2005); *McAllister Towing & Transportation Co.*, 341 NLRB 394, 400, enfd. 155 Fed. Appx. 386 (2d Cir. 2004); *Blockbuster Pavilion*, 331 NLRB 1274, 1276 (2000); *Wallace Int'l de Puerto Rico, Inc.*, 328 NLRB 29, 30 (1999).

[45]My research found only case where both remedies were ordered. See, *Concrete Form Walls, Inc.*, 346 NLRB 831 2006) (ordering *Gissel* bargaining order and reading of notice).

The Union's request to extend the 2007 NBCW Agreement *to M&P and Justice Highwall employees*

The Union, in its posthearing brief contends, contrary to the position of the General Counsel and the Respondent, that the appropriate remedy for the Respondent's violations of the Act is the application of the 2007 NBCW Agreement, which currently governs Dynamic employees' terms and conditions of employment, to "each of the single employer affiliates," M&P and Justice Highwall.

"[I[t is well established that the General Counsel's failure to seek specific remedy does not limit the Board's authority under Section 10(c) of the Act to fashion an appropriate make-whole remedy." *Willamette Industry*, 341 NLRB 560, 564 (2004). The Board may adopt, and a charging party, such as the Union here, may argue for, put on evidence in support of, and urge the Board to adopt a remedy for an unfair labor practice, whether or not the General Counsel pursues that remedy. *Kaumagraph Corp.*, 313 NLRB 624, 625 (1994). By the same token, the General Counsel is the "master of the complaint and controls the theory of the case." *Fineberg Packing Co.*, 349 NLRB 294, 296 (2007). "A charging party may not expand the scope of the complaint without the consent of the General Counsel." *Planned Building Services*, 330 NLRB 791, 793 fn. 13 (2000). Section 3(d) of the Act vests the General Counsel with "final authority, on behalf of the Board, in respect of . . . the prosecution of [unfair labor practice] complaints before the Board." 29 U.S.C. § 153(d). As Judge Clifford Anderson explained, in reasoning adopted by the Board, "if a particular violation of the Act is not alleged by the General Counsel and such a violation is necessary for a particular remedy to be invoked then the General Counsel has, by refusing to allege such a violation, precluded the Board from directing such a remedy." *New Breed Leasing*, 317 NLRB 1011, 1019 (1995), enfd. 111 F.3d 1460 (9th Cir. 1997).

In this case, the Union advances three principal rationales for its preferred remedy. The Union asserts that the remedial extension of the NBCW Agreement to the other two Respondents' employees at Coal Mountain may be based on a finding that (1) the individual Respondents operate as "alter egos of one another," (2) the employees from the three Respondent single employers constitute a single appropriate unit, or (3) the unit description contained in the NBCW Agreement can be read to cover the work performed by the M&P and Justice Highwall employees.

In making these claims, the Union accepts the inarguable: none of these claims was alleged—explicitly or implicitly—in any complaint. Moreover, the General Counsel's allegations are inconsistent with a claim that all three Respondents' employees are part of one unit or all covered by the existing collective-bargaining agreement. This alone disposes of these two bases for the Union's proposed remedy, as to accept them would be to invade the General Counsel's exclusive prerogative under Section 3(d) of the Act.[46]

Although not in the complaint, the Union contends (CP Br. at 4) that these findings may be made (and then the proffered remedy imposed) because allegedly they were "fully litigated"

[46]Thus, the General Counsel alleges (par. 13 Dynamic/Justice complaint) that under the NBCW Agreement, the Respondent unlawfully assigned Dynamic unit work to non-bargaining unit employees, primarily Justice Highwall employees. Moreover, the General Counsel affirmatively alleges separate bargaining units for the employees of M&P (par. 7(a)), Justice Highwall (par. 8(a)), and Dynamic (par. 10)

at the hearing. This is a reference to the Board's *Pergament* doctrine, under which the Board may find an unalleged violation "if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Pergament United Sales, Inc.*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990).

Pergament's applicability to these circumstances is in doubt. First, as referenced, above, two of the three findings sought by the Union contradict facts pled by the General Counsel. I am unaware of instances in which the Board relies upon *Pergament* to make findings that contradict the pleadings. Second, *Pergament* applies to unpled unfair labor practices, not to unpled allegations of fact. *GPS Terminal Services*, 333 NLRB 968, 969 fn. 9 (2001). The finding of an appropriate unit, the reading of a contractual clause regarding the proper scope of the unit, and the finding of alter ego status, are not allegations of an unpled unfair labor practice, but simply factual findings that the Union urges as ladder to stand on to justify its remedy.

But even assuming the applicability of the *Pergament* doctrine, and even assuming that each of the Union's theories are "closely connected" to the complaints' subject matter, they were not, by any stretch, "fully litigated."

As explained in *Pergament*, 296 NLRB at 335:

> the recognized principle that the determination of whether a matter has been fully litigated rests in part on whether the absence of a specific allegation precluded a respondent from presenting exculpatory evidence or whether the respondent would have altered the conduct of its case at the hearing, had a specific allegation been made.

In other words, had the contention been pled, and the Respondent been on notice, would it have been in a position to present additional or different evidence that reasonably might have led to its exoneration on the proposed unpled allegation? If the allegation had been expressly alleged, would the Respondent have altered its trial tactics in a way that might have made a difference?

It is abundantly clear to me that each of the unpled contentions might be the subject of exculpatory evidence or different trial conduct by the Respondents, had they known.

As to alter ego status, as the Union argues, the Board's single employer and alter ego doctrines share a lot, involve overlapping evidence, and often coexist. "[T]he elements necessary to prove alter ego and/or single employer status are much the same." *Vallery Electric, Inc.*, 336 NLRB 1272 (2001), enfd. 337 F.3d 446 (5th Cir. 2003). But they exist as different concepts for a reason. Single employer analysis focuses on whether there is common overall control of two (or more) ostensibly separate employers at the policy level, including of labor relations, management, ownership and interrelation of operations. See generally, *Covanta Energy Corp.*, 356 NLRB No. 98, slip op at 21–22 (2011), and cases cited therein. Alter ego theory is more readily applicable where a new enterprise is the disguised continuance of part or all of a prior enterprise (usually a unionized one) that has ostensibly ceased operations. *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942) (enterprise will be deemed the alter ego of a predecessor corporation if there was not "a bona fide discontinuance and a true change of ownership" or if there was "merely a disguised continuance of the old employer"). Accord, *San Luis Trucking, Inc.*, 352 NLRB 211, 228 (2008) ("The alter ego doctrine is considered, in general, when one employer succeeds another. The single-employer doctrine is examined in the case of two ongoing businesses. [The respondents] were two ongoing

businesses and are more appropriately considered under the single-employer doctrine"), reaffirmed and incorporated by reference, 356 NLRB No. 36 (2010) (citing *NLRB v. Hospital San Rafael, Inc.*, 42 F.3d 45, 50 (1st Cir. 1994), cert. denied 516 U.S. 927 (1995)).

In this case, the issue of whether any of the respondents is a "disguised continuance" of any one of the other was not pled, and was not litigated either. There is no evidence in the record that can fairly be said to conclusively answer the questions at issue in an alter ego case. Indeed, even the array of underlying factual considerations that typically go into a single employer finding are absent. This is because the parties stipulated—they did not litigate at trial—the ultimate fact of the single employer status of the Respondents. Hence, the component factual evidence for the single employer finding is quite limited on this record, and what there is was adduced for other purposes. Because of this stipulation, there was extremely limited testimony about factual elements that go into either a alter ego or a single employer finding. The finding of an alter ego relationship on this record would constitute a complete blindsiding of the Respondents. The issue was not litigated, much less "fully" so as required by *Pergament.*[47]

As to the Union's other issues: the appropriateness of a single unit for all three bargaining units, and the issue of whether the NBCW Agreement can be read to cover all three units—these were not only not "fully litigated" but the opposite proposition was advanced "against" the Respondents by the General Counsel.

Absent finding an alter ego relationship between the Respondents, the appropriateness of a single unit covering the Respondents' employees, or a contractual obligation to apply the contract to all three sets of employees, there is no basis for the remedy sought by the Union. I do not believe such findings are appropriate, and hence, I do not recommend the Union's suggested remedy for the Respondents' violations of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[48]

[47]I note that, in addition to being a question of fundamental fairness, as a matter of agency and litigants' expense and time, it would seem very unwise to discourage respondents from stipulating to complaint allegations out of fear that those stipulations will be used against them to find different, unalleged, and unmentioned theories of violation. This case, which took six days to try and produced a transcript of 1250 pages, would have been significantly longer had the single employer issues been contested. The Respondent, for whatever set of practical or tactical reasons chose not to defend those allegations, which saved the agency and all parties' significant resources. I cannot see a respondent making the same choice if it had cause for concern that the record needed to be protected from unspoken theories of violation that might be implicated by the stipulation regarding a pled allegation.

[48]If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondents Dynamic Energy, Inc., Justice Highwall Mining, Inc., and M&P Services, Inc. (a single employer) Coal Mountain, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee because of employees' union activities.

(b) Coercively interrogating any employee about his union sympathies.

(c) Soliciting any employee to sign a decertification petition or to solicit others to sign a decertification petition.

(d) Promising any employee better wages, benefits, or working conditions for supporting or assisting with a decertification petition.

(e) Stating or implying to any employee that the Respondents want employees to quit their employment because of their union activities.

(f) Stating or implying to any employee that he or she is being transferred in retaliation for participation in grievance activities.

(g) Refusing to bargain with the Union as the representative of its Justice Highwall employees by making unilateral changes in unit employees' terms and conditions of employment, including vacation scheduling, without providing the Union advance notice and an opportunity to bargain to a lawful impasse.

(h) Refusing to recognize and bargain since March 12, 2010, with the Union as the exclusive representative of the following appropriate unit of M&P Services employees

> All equipment operators and scalehouse employees employed at the Employer's Coal Mountain W.V. location but excluding all office clericals, guards, managerial employees and supervisors as defined by the Act.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Within 14 days from the date of this Order, offer Stephen Paynter, Nathan Brown, Phillip Coleman, Jeremy Blankenship, Shawn Sheppard, and Christopher Champagne full reinstatement to their former positions, or, if those positions no longer exist, to substantially equivalent jobs, without prejudice to their seniority or any other rights and privileges previously enjoyed.

(b) Make Stephen Paynter, Nathan Brown, Phillip Coleman, Jeremy Blankenship, Shawn Sheppard, and Christopher Champagne whole for any loss of earnings

and other benefits suffered as a result of their unlawful discharge, with interest, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files, including the above-named employees' personnel files, any reference to their discharge, and within three days thereafter notify these employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Reinstate the vacation scheduling policy for Justice Highwall unit employees in effect at the time of the April 23, 2010 representation election covering those employees.

(e) Before implementing any changes in wages, hours, or other terms and conditions of employment of Justice Highwall union represented employees, notify, and on request bargain with the Union to a lawful impasse as the exclusive collective-bargaining representative of employees in the bargaining unit set forth in the certification of representation dated May 3, 2010.

(f) On request, bargain with the Union as the exclusive bargaining representative of the M&P Services employees in the following appropriate unit concerning terms and conditions of employment, and, if an agreement is reached embody the understanding in a signed agreement:

> All equipment operators and scalehouse employees employed at the Employer's Coal Mountain W.V. location but excluding all office clericals, guards, managerial employees and supervisors as defined by the Act.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility at Coal Mountain, West Virginia, copies of the attached notice marked "Appendix."[49] Copies of the notice, on forms provided by the Regional director for Region 9, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondents customarily communicates with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by

[49] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed any facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since March 12, 2010.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

IT IS FURTHER ORDERED that the complaints are dismissed insofar as they allege violations of the Act not specifically found.

Dated, Washington, D.C. August 10, 2011

_____
David I. Goldman
U.S. Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Mailed by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post, mail and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge or discriminate against you because of your union activities.

WE WILL NOT coercively interrogate you about your union sympathies.

WE WILL NOT promise you better wages, benefits, or working conditions for supporting or assisting with a decertification petition.

WE WILL NOT state or imply to you that we want you to quit employment because of your union activities.

WE WILL NOT state or imply to you that a shift transfer is in retaliation for your participation in grievance activities.

WE WILL NOT refuse to bargain with the Union regarding the terms and condition of employment for Justice Highwall employees by making changes in employees' terms and conditions of employment, including vacation scheduling, without notifying the Union and providing an opportunity to bargain to a lawful impasse.

WE WILL NOT refuse to recognize and bargain with the Union as the exclusive representative of our M&P Service employees in the following appropriate unit

All equipment operators and scalehouse employees employed at the Employer's Coal Mountain W.V. location but excluding all office clericals, guards, managerial employees and supervisors as defined by the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL offer Stephen Paynter, Nathan Brown, Phillip Coleman, Jeremy Blankenship, Shawn Sheppard, and Christopher Champagne full reinstatement to their former positions, or, if those positions no longer exist, to substantially equivalent jobs, without prejudice to their seniority or any other rights and privileges previously enjoyed.

WE WILL make Stephen Paynter, Nathan Brown, Phillip Coleman, Jeremy Blankenship, Shawn Sheppard, and Christopher Champagne whole for any loss of earnings and other benefits suffered as a result of our unlawful conduct, with interest compounded on a daily basis.

WE WILL remove from our files any reference to the unlawful discharges of Stephen Paynter, Nathan Brown, Phillip Coleman, Jeremy Blankenship, Shawn Sheppard, and Christopher Champagne, and WE WILL, within three days thereafter, notify these employees in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL reinstate the vacation scheduling policy for Justice Highwall bargaining unit employees in effect at the time of the April 23, 2010 representation election and WE WILL provide the Union notice and an opportunity to bargain to impasse before making changes in the vacation scheduling policy.

WE WILL, upon request, recognize and bargain with the Union as the collective-bargaining representative of the M&P employees, in the above-described unit, and, upon request, WE WILL put in writing any agreement reached on terms and conditions of employment for the employees.

Dynamic Energy, Inc. and Justice Highwall Mining, Inc., and M&P Services, Inc.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

550 Main Street, Federal Building, Room 3003, Cincinnati, OH 45202-3271

(513) 684-3686, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (513) 684-3750.